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**TI** The Tax  
Institute

# Taxation *in* Australia

**Business  
restructures using  
the small business  
CGT concessions**

*Karen Goodfellow, CTA*

**Holistic tax and estate  
planning: a guide for 2026**

*Matthew Burgess, CTA*

**Farm equity partnerships**

*Tony Eyres*



# Contents

## Cover article

309

Business restructures using the small business CGT concessions

Karen Goodfellow, CTA, Principal, Goodfellow Tax Advisory

## Feature articles

318

Holistic tax and estate planning: a guide for 2026

Matthew Burgess, CTA, Director, View Legal

326

Farm equity partnerships

Tony Eyres, Executive Director, Rounding Up

## Insights from the Institute

292 President's Report

293 CEO's Report

294 Head of Tax & Legal's Report

## Regular columns

291 Tax News – at a glance

298 Tax News – the details

303 Tax Tips

307 Higher Education

340 A Matter of Trusts

344 Superannuation

349 Cumulative Index

### Invitation to write

We welcome original contributions that are of interest to tax professionals, lawyers, academics and students.

For details about submitting articles, see Guidelines for Publication on our website [taxinstitute.com.au](https://taxinstitute.com.au), or contact [publications@taxinstitute.com.au](mailto:publications@taxinstitute.com.au).



## Tax News – at a glance

by TaxCounsel Pty Ltd

# November – what happened in tax?

The following points highlight important federal tax developments that occurred during November 2025. A selection of the developments is considered in more detail in the “Tax News – the details” column on page 298 (at the item number indicated).

### Ukraine tax agreement

A double tax treaty between Australia and Ukraine which was signed on 16 October 2025 will give Australians who earn income in Australia and also in Ukraine more certainty and lower compliance costs. **See item 1.**

### ART proceedings

An amending Bill (the Administrative Review Tribunal and Other Legislation Amendment Bill 2025) that was passed by the House on 3 November 2025 is amending the Act that established the Administrative Review Tribunal (ART) to insert an additional circumstance in which the tribunal may make its decision in a proceeding without holding the hearing of the proceeding. **See item 2.**

### Private groups: 2025–26 ATO compliance focus

The ATO has refreshed its web content relating to its areas of focus for privately owned and wealthy groups to reflect the ATO priorities for 2025–26. **See item 3.**

### Goods taken from stock: 2025–26

The Commissioner has released a taxation determination that provides an update of amounts that the ATO will accept for the 2025–26 income year as estimates of the value of goods taken from trading stock for private use by taxpayers in named industries (TD 2025/7). **See item 4.**

### GST: fund-raising events

The Commissioner has released for consultation a draft legislative instrument that would allow an endorsed charity, a gift-deductible entity or a government school to treat all supplies that it makes in relation to a fund-raising event as being input-taxed where it holds 15 or fewer like or similar fund-raising events in a prescribed accounting year (LI 2025/D22). **See item 5.**

### Land development: GST liability

The ART has held that a taxpayer, an individual, was liable for GST on the sales of subdivided land on the basis that the sales were made in the course or furtherance of an enterprise (as defined for the purposes of GST) carried on by the taxpayer (*VZFS and FCT [2025]* ARTA 2013). **See item 6.**

### Default assessments

A recent decision of the ART provides a further example of the difficulties that a taxpayer can encounter when seeking to discharge the onus of proving that a default assessment is excessive or otherwise incorrect (*Olow and FCT [2025]* ARTA 1924). **See item 7.**



## President's Report

by Tim Sandow, CTA

# Reflecting on 2025 and what it meant to the industry

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President Tim Sandow reflects on the changes in the tax industry in 2025 and his hopes for 2026.

At the beginning of this year, when I took up the role of President, I outlined three core areas of focus that I felt were important for our members, and for increasing certainty within our tax system: tax reform, addressing announced but unenacted measures, and administration of the tax system.

These are long-term, systemic issues that – despite the fact that any of us could lay out a number of perfectly good technical solutions – in reality, don't have easy answers. But I do believe we are making progress in these all-important areas.

The industry this year has seen a number of changes that have shaken things up. For example, the Full Federal Court's decision in *FCT v Bendel*<sup>1</sup> was a significant development and I know many of us will be watching the High Court decision with great interest.

The family trust distribution tax and the incredibly complex tax law in relation to family arrangements is another area of interest that is ongoing. The steep consequences for an honest mistake in this area make it a considerable cause for concern among practitioners. Our Tax Policy and Advocacy team, alongside our technical committee members, are currently working on advocacy on this issue – stay tuned for more on that.

While advocacy can sometimes seem difficult, we were pleased to see the changes announced to the Div 296 superannuation measures to index the thresholds and not tax unrealised gains – a sensible outcome from all of our advocacy efforts.

Tax reform – holistic, sweeping reform that will ensure our system is robust and sustainable enough to serve us for years to come – is our ongoing priority, which all of our advocacy work ultimately ladders up to. We continue to work towards this goal.

Our members are active and engaged, lending their expertise to quickly analyse changes in the tax system and share that knowledge with their fellow members. They are also vital in our advocacy work, from identifying issues to analysing them and suggesting solutions, representing the Institute and their fellow members, and even engaging their clients in understanding the impact of an outdated tax system and uncertain tax law.

While there is still a long way to go in fixing our tax system, I am pleased with what our community has achieved together over the past 12 months, and I look forward to the progress that will be made in 2026.

Last, but certainly not least, I wish all of our members a safe a restful holiday season and a happy new year. The work will still be there next year – I hope you take some time off to reset, recharge and revitalise this month.

### Reference

- 1 [2025] FCAFC 15.



## CEO's Report

by Scott Treatt, CTA

# Wrapping up a year of sharing knowledge

CEO Scott Treatt reflects on 2025 at The Tax Institute and its ongoing role in the industry.

As 2025 comes to a close, I hope you are all winding down for a restful festive season. Opportunities to slow down, pause and reflect can be few and far between when working in tax – despite any popular notions to the contrary, it really is a bustling, busy and fast-paced kind of profession.

For those of you who joined us in Noosa at the end of last month, I hope it was as restorative for you as that event tends to be. It's an excellent way to round out our year of CPD events – with good company, good vibes and great technical insights.

This year, the importance of education and the flow from education to knowledge, knowledge to growth and exciting new opportunities has been at the forefront of my mind. Without ongoing education, our profession would not be where it is today, and neither would our Institute.

In November of last year, we officially launched Tax Academy, our modern, flexible learning path, designed to bring tax learning into the future. Structured education still plays a vital role in tax practitioners' careers and in the Institute. But new ways of learning must be embraced as well, especially in a world as fast-paced and ever-evolving as ours.

We recently invited some feedback on Tax Academy from those early adopters who were among the first to experience microcredential learning with us. Among the insights we gathered, one thing stood out to me in a wonderful way: the people embracing Tax Academy didn't do so for a certificate or a badge (though you get one of those too!), and not even for bragging rights. They embraced these self-paced, self-motivated learning opportunities for the knowledge. For the confidence to walk into a client meeting and be ready, no matter where the conversation took them. To be able to talk to colleagues in different specialties and have insightful, engaged conversations. For the ability to do their job to the best of their ability, even when it stretches into unfamiliar new territory.

I'm thrilled to hear this and to have it confirmed: our members are here to gather and share knowledge. If the Institute is known on a national stage for anything, I hope it's that.

So, I want to thank our members and the wider community for making 2025 the year that it was and for being with us on this journey.

And as we welcome 2026, I'm excited by what's to come. From local engagement to investment in our technology and platforms, I'm hoping the next 12 months will be a period of further growth and stability for our Institute.

I wish you all a safe and happy holiday period. Enjoy your break and we will see you in 2026.



## Head of Tax & Legal's Report

by Julie Abdalla, FTI

# 2025: the year in review

We reflect on the past year in tax and unpack the highlights of 2025.

### Tax reform on the political agenda

The 2025 federal election marked a significant moment in Australia's political landscape, with the Australian Labor Party achieving a sweeping victory. Following this outcome, on 18 June 2025, Treasurer Jim Chalmers [announced](#) three key priorities for the Labor Government's second term, emphasising the need to address global economic uncertainties. These priorities include enhancing productivity, strengthening budget sustainability, and improving economic resilience, all aimed at uplifting living standards for Australians.

### Productivity Commission Inquiry

The government commissioned the Productivity Commission to conduct five inquiries to identify priority reforms under its five-pillar growth agenda. These are priority reforms that enhance productivity through:

- [creating a more dynamic and resilient economy](#);
- [building a skilled and adaptable workforce](#);
- [harnessing data and digital technology](#);
- [delivering quality care more efficiently](#); and
- [investing in cheaper, cleaner energy and the net-zero transformation](#).

The initial consultations on these five pillars closed in June 2025 and further consultations followed the interim reports.

The consultation questions for "Pillar 1: Creating a more dynamic and resilient economy" inquiry indicated the government's focus on reforming specific aspects of tax law, particularly corporate tax, to enhance productivity and investment.

On 31 July 2025, the Productivity Commission released its interim report on Pillar 1, containing draft recommendations focused on two key policy reform areas:

- corporate tax reform to spur business investment; and
- regulating to promote business dynamism.

The Tax Institute actively contributed to the consultations on Pillar 1, with the following submissions published on our website:

- [submission](#) to the Productivity Commission's inquiry into creating a more dynamic and resilient economy; and
- subsequent [submission](#) to the Productivity Commission in response to its consultation on the interim report.

### Economic Reform Roundtable

Ahead of the Economic Reform Roundtable held from 19 to 21 August 2025, the Treasurer opened [public consultation](#) and invited proposals and ideas for tax reform. The Tax Institute's submission to the federal government's Economic Reform Roundtable is available [here](#).

Other ministers and members of parliament also hosted a series of roundtables and discussions with stakeholders. For example, the Minister for Small Business, Minister for International Development, Minister for Multicultural Affairs, the Hon. Dr Anne Aly MP, led a Small Business Roundtable on 24 July 2025, followed by a tax reform roundtable hosted by Ms Allegra Spender MP on 25 July 2025, both of which I attended on behalf of The Tax Institute and our members.

Following the Economic Reform Roundtable, the treasurer [announced](#) three objective areas within the tax system that will be prioritised by the government, which include:

- achieving "a fair go for working people", including in terms of intergenerational equity;
- finding "an affordable, responsible way" to encourage business investment; and
- making the tax system "simpler, more sustainable" to fund services, particularly as the population ages.

### The Art of Tax Reform

The reform dialogue extended to the state level. Notably, the NSW Government hosted the Art of Tax Reform Summit at the Sydney Opera House on 25 September 2025, which explored how targeted tax measures could support the creative industries. This followed earlier consultation to which The Tax Institute made a [submission](#), and I attended the Summit to provide further insights on areas of tax reform that could provide better support to Australia's creative industries.

### The Board of Taxation's Red Tape Reduction Review

On 24 September 2025, the Treasurer tasked the Board of Taxation (the Board) with identifying ways to responsibly reduce unnecessary compliance burdens and red tape in the tax system. The Board released a consultation guide on 27 October 2025 for the *Red Tape Reduction Review* (the Review).

As part of the Review, the Board will stocktake any tax-related compliance and red tape reduction recommendations from the Economic Reform Roundtable

public submissions, as well as from previous Board reviews and recent stakeholder engagement by the Board that discussed the tax compliance burden.

Before the Board opened the Review for public consultation, and following the discussion between the Board, The Tax Institute's Tax Policy and Advocacy team, and the members of our National Large Business and International Technical Committee, on 3 October 2025, The Tax Institute made a [proactive submission](#) to the Board providing preliminary recommendations to reduce red tape in the tax system. We continue to work with our members and the Board to explore further ideas for reducing red tape.

## Superannuation

### Payday Super

With the enabling legislation receiving royal assent on 6 November 2025, from 1 July 2026, Payday Super will require employers to pay their employees' superannuation at the time they pay salaries and wages. In March this year, Treasury [consulted](#) on the draft Payday Super exposure draft legislation and explanatory memorandum. The joint submission on the draft explanatory materials lodged with the Treasury by The Tax Institute and other professional associations is available [here](#). The joint bodies have also made a [submission](#) to the ATO regarding the proposed transitional approach contained in PCG 2025/D5 *Payday Super – first year ATO compliance approach*.

### Division 296: targeted superannuation concessions

On 13 October 2025, the Treasurer [announced](#) major changes to the proposed Div 296 tax, notably eliminating the most contentious aspect of taxing unrealised gains. This removes a highly controversial and unfair feature of this proposed reform, which could have resulted in taxpayers being subject to tax on earnings they never receive. A new two-tiered progressive tax system has been announced, imposing a 30% effective tax rate on superannuation earnings for balances between \$3 million and \$10 million, and a 40% rate for balances over \$10 million, indexed relative to the transfer balance cap. The start date for these changes has been extended to 1 July 2026, with total balances assessed as of 30 June 2027 and the first tax assessments expected in the 2027–28 financial year.

## Small and medium enterprises

### Instant asset write-off

On 4 April 2025, the government [announced](#) that it would extend the temporary \$20,000 instant asset write-off by a further 12 months, until 30 June 2026, to support small businesses. On 4 September 2025, the Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025, containing this measure, was introduced into parliament. Schedule 7 to the Bill proposes to amend s 328-180 of the *Income Tax (Transitional Provisions) Act 1997* (Cth) to extend the \$20,000 instant asset write-off for another 12 months. Without this

amendment, the write-off threshold would revert to \$1,000 from 1 July 2025. The Bill also proposes to continue deferring the “lock-out” rule for small businesses that have previously opted out of the simplified depreciation rules until 30 June 2026. The Tax Institute's submission to the Senate Economics Legislation Committee in respect of its inquiry on the Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025 is available [here](#).

### Commissioner's appeal on UPEs

Another important development that attracted significant attention in the SME sector is the Full Federal Court's (FCAFC's) decision in *FCT v Bendel*.<sup>1</sup> The FCAFC's decision is contrary to the ATO's longstanding view regarding the classification of unpaid present entitlements (UPEs) between a trust and a private company as a loan for the purposes of Div 7A of Pt III of the *Income Tax Assessment Act 1936* (Cth). Following the decision in *Bendel*, on 18 March 2025, the ATO applied for special leave to appeal the FCAFC's decision to the High Court. The High Court granted special leave on 12 June 2025. On 14 October 2025, the High Court heard the appeal in *Bendel*. The transcript of that hearing indicates that the outcome of this case could have profound implications, not only for the application of Div 7A to UPEs, but also to the taxation of income more broadly. The next hearing is scheduled for 3 December 2025.

### Family trust distribution tax

Family trust distribution tax (FTDT) is a distinct tax imposed by the *Family Trust Distribution Tax (Primary Liability) Act 1998* (Cth). It is payable at the top marginal rate of tax applying to individuals plus Medicare levy (currently 47%), and is triggered by an entity that has made a family trust election or an interposed entity election when the entity makes distributions or confers benefits to an entity outside the “family group”. The FTDT notice review period is unlimited, which means that, if the ATO detects an FTDT liability today, even from decades ago and resulting from an inadvertent or honest error, years of interest can be applied to the liability, creating an enormous tax exposure. This situation is further exacerbated by the recent legislative change that removed the deductibility of the general interest charge and shortfall interest charge associated with such liabilities. The result can be that the accumulated family wealth of a generation can be wiped out by an FTDT liability. There are known issues with the FTDT provisions, and the unfair and unintended outcomes that can result can only be rectified through legislative amendments. The Tax Institute is preparing a proactive submission to the Minister, highlighting issues with the FTDT provisions and seeking legislative reform.

## Individuals

### Proposed \$1,000 instant tax deduction

On 13 April 2025, the government [announced](#) an election commitment of a \$1,000 instant tax deduction for work-related expenses. This change is proposed to apply from 1 July 2026. To date, no consultation has occurred

regarding this measure, and no Bill has been introduced into parliament.

### Personal income tax: new tax cuts

As part of the [2025–26 Federal Budget](#), the government announced that, from 1 July 2026, it would deliver new tax cuts to every Australian taxpayer.

The new tax cuts result in the following changes:

- from 1 July 2026 – the 16% rate (on income above the tax-free threshold up to \$45,000) will be reduced to 15%; and
- from 1 July 2027 – this 15% rate will be reduced further to 14%.

### Medicare levy reduction for low-income earners

The government also increased the Medicare levy low-income thresholds for singles, families, and seniors and pensioners from 1 July 2024 to provide cost-of-living relief. The increase to the thresholds ensures that low-income individuals continue to be exempt from paying the Medicare levy, or pay a reduced levy rate.

The *Treasury Laws Amendment (More Cost of Living Relief) Act 2025*, containing these measures, received royal assent on 28 March 2025.

## International tax

### PepsiCo case

On 13 August 2025, the High Court handed down its landmark decision in *FCT v PepsiCo, Inc.*<sup>2</sup> The High Court dismissed the Commissioner of Taxation's appeals, confirming that no royalty withholding tax or diverted profits tax applied. The 4:3 majority decision highlights the complexity of interpreting the law with regard to royalties and cross-border arrangements.

Another significant case regarding royalty withholding tax that is still working its way through the courts was the full Federal Court's decision in *Oracle Corporation Australia Pty Ltd v FCT*.<sup>3</sup>

## State taxes

### Inquiry into the application of the contractor and employment agency provisions in the Payroll Tax Act 2007 (NSW)

In response to the NSW Legislative Council's inquiry into the application of the contractor and employment agency provisions in the *Payroll Tax Act 2007* (NSW), The Tax Institute made a [submission](#) calling for reform to improve certainty for taxpayers. Our submission highlighted that the contractor and employment agency provisions were designed as anti-avoidance measures which have remained unchanged for an extended period, but which appear to be interpreted increasingly widely to capture arrangements that were never intended to be within the scope of the original policy. It is essential to evaluate their relevance in the context of today's on-demand and gig economy. On Friday, 21 March 2025, I appeared as an expert witness

before the NSW Legislative Council regarding this inquiry (more information is available on our [website](#)).

### Uber decision

On 1 August 2025, the NSW Court of Appeal delivered a unanimous judgment in favour of the Chief Commissioner in *Chief Commissioner of State Revenue v Uber Australia Pty Ltd*,<sup>4</sup> confirming that payments made by Uber to its drivers were subject to payroll tax. This decision overturned the earlier ruling made by the NSW Supreme Court in the case of *Uber Australia Pty Ltd v Chief Commissioner of State Revenue*.<sup>5</sup> With the growth of the "gig economy", this case has significant implications for workers and online service providers in NSW and potentially other states. Uber Australia Pty Ltd filed an application for special leave to the High Court of Australia on 29 August 2025.

## 2026: looking ahead

The government's focus this year regarding productivity, budget sustainability, and tax reform have generated significant interest in the upcoming Federal Budget for 2026–2027. We, along with our members, are also anticipating the High Court's decision in the *Bendel* case, which will have important implications regardless of the outcome. Additionally, we are keen to observe the developments stemming from the tax and economic reform roundtables, the Productivity Commission inquiry, and the Board of Taxation's *Red Tape Reduction Review*, as well as the government's strategic approach to tax reform.

We are looking forward to a positive and productive 2026, and continuing to support, represent and advocate on behalf of our members. Wishing you all a Merry Christmas, a restful and enjoyable festive season, and a Happy New Year.

### References

- 1 [2025] FCAFC 15.
- 2 [2025] HCA 30.
- 3 [2025] FCAFC 145.
- 4 [2025] NSWCA 172.
- 5 [2024] NSWSC 1124.



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## Tax News – the details

by TaxCounsel Pty Ltd

# November – what happened in tax?

The following points highlight important federal tax developments that occurred during November 2025.

### Government initiatives

#### 1. Ukraine tax agreement

A double tax treaty between Australia and Ukraine which was signed on 16 October 2025 will give Australians who earn income in Australia and also in Ukraine more certainty and lower compliance costs.

The new tax treaty will provide tax certainty for individuals who have dealings in both Ukraine and Australia, for example, by:

- allocating taxing rights between the jurisdictions over different categories of income, such as pensions, employment income and capital gains; and
- providing an avenue for taxpayers to present a case to relevant tax authorities where a taxpayer considers that there has been taxation that is not in line with the terms of the treaty.

Further, the new tax treaty is expected to enhance the economic relationship between Australia and Ukraine, for example, by:

- reducing withholding tax rates on royalties, dividends and interest in both Australia and Ukraine; and
- reducing compliance costs and improving certainty for businesses that have dealings in both Australia and Ukraine.

The new tax treaty will enhance tax system integrity by incorporating important measures to address base erosion and profit-shifting practices, specific treaty anti-abuse rules, and mechanisms to facilitate cooperation between tax authorities.

The treaty will also help to prevent avoidance and evasion of taxes on various income flows between the treaty partners by, for example, providing for the allocation of profits between related parties on an arm's length basis and generally preserving the application of domestic laws that are designed to address tax avoidance.

The new tax treaty will enter into force after both countries have completed their domestic requirements, and instruments of ratification have been exchanged.

For Australia, this involves the enactment of implementing legislation.

#### 2. ART proceedings

An amending Bill (the Administrative Review Tribunal and Other Legislation Amendment Bill 2025) that was passed by the House on 3 November 2025 is amending the Act that established the Administrative Review Tribunal (ART) by inserting an additional circumstance in which the tribunal may make its decision in a proceeding without holding the hearing of the proceeding.

The additional circumstance is:

- if it appears to the tribunal that the issues for determination in the proceeding can be adequately determined in the absence of the parties to the proceeding;
- if it appears to the tribunal that it is reasonable in the circumstances to make its decision in the proceeding without holding the hearing of the proceeding; and
- if the tribunal has given the parties to the proceeding (other than a non-participating party) a reasonable opportunity to make submissions to the tribunal in relation to the tribunal making its decision without holding the hearing of the proceeding, and the tribunal has taken into account any submissions received.

The new discretion is intended to give the tribunal additional flexibility in relation to the procedures to be followed in a proceeding. Exercise of the new discretion would be conditioned by appropriate safeguards to ensure that it would be able to be exercised compatibly with the tribunal's existing obligation to afford parties an opportunity to present their case. This would support the objective of the tribunal resolving matters as quickly, and with as little formality, as a proper consideration of the matter permits, especially given the time and resources required to conduct a substantive hearing.

Once it is enacted, the new discretion is to commence on a day to be fixed by proclamation.

### The Commissioner's perspective

#### 3. Private groups: 2025–26 ATO compliance focus

The ATO has refreshed its web content relating to its areas of focus for privately owned and wealthy groups to reflect the ATO priorities for 2025–26.

To complement the website update, two Assistant Commissioners presented a webinar on 23 September 2025 detailing the key areas of focus for the current financial year – what is attracting the ATO's attention, where the ATO is seeing common mistakes, and the areas the ATO is seeking to better understand in order to shape its engagement with taxpayers. The Assistant Commissioners also shared some practical insights to help private groups meet their tax obligations and prevent unintended consequences.

The ATO's refreshed focus areas reflect changes in the broader operating environment and demographics for private groups. The ATO is seeing increasing tax complexity as private groups grow, diversify and expand into new markets or overseas, alongside an ageing demographic that's considering succession planning and asset transfers. At the same time, the ATO continues to observe recurring compliance issues, often stemming from gaps in governance, internal controls or the quality of advice received.

In 2025–26, the ATO is paying close attention to:

- the use of business money for personal or other group purposes, with a particular focus on Div 7A arrangements and the tax treatment of lifestyle assets;
- the tax consequences of succession planning activities, including where private groups restructure, dispose of assets, transfer wealth or implement arrangements aimed at minimising or avoiding tax – the ATO is focused on ensuring private groups understand the tax implications of the decisions it makes;
- tax risks arising from specific industries or activities, such as property and construction, private equity and international dealings; and
- ensuring compliance with core tax obligations, including:
  - correctly reporting income, sales and capital gains;
  - meeting eligibility requirements for concessions or entitlements claimed; and
  - the timely lodgment of returns and schedules and payment of tax debts.

#### 4. Goods taken from stock: 2025–26

The Commissioner has released a taxation determination that provides an update of amounts that the ATO will accept for the 2025–26 income year as estimates of the value of goods taken from trading stock for private use by taxpayers in named industries (TD 2025/7).

The relevant industries are:

- bakery;
- butcher;
- restaurant or café (licensed);
- restaurant or café (unlicensed);
- caterer;
- delicatessen;
- fruiterer or greengrocer;
- takeaway food shop; and
- mixed business (incorporating milk bars, general stores and convenience stores).

#### 5. GST: fund-raising events

The Commissioner has released for consultation a draft legislative instrument that would allow an endorsed charity, a gift-deductible entity or a government school to treat all supplies that it makes in relation to a fund-raising event

as being input-taxed where it holds 15 or fewer like or similar fund-raising events in a prescribed accounting year (LI 2025/D22).

Under s 40-160 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTA99), an endorsed charity, a gift-deductible entity and a government school (as defined) may be able to choose to treat all supplies that they make in connection with a fund-raising event (as defined) as input-taxed, subject to other requirements specified in the section.

The expression “fund-raising event” is defined in s 40-165(1) GSTA99 to mean events that are conducted for the purpose of fund-raising. It includes a fete, ball, gala show, dinner, performance, or other similar events. It includes an event involving the sale of goods where each sale does not exceed \$20 and selling such goods is not part of the entity's normal business. It also includes events determined by the Commissioner to be a fund-raising event for the purposes of s 40-165(1)(c). However, where these events form part of a series or regular run of like or similar events, they are excluded from the definition of “fund-raising event” in s 40-165(1).

Where a fund-raising event forms part of a series or regular run of like or similar events, the endorsed charity, gift-deductible entity or government school cannot choose to treat supplies made in connection with any of the events held in that prescribed accounting year as input-taxed.

Under s 40-165(4), the Commissioner has the power to determine the frequency with which fund-raising events may be held without forming any part of a series or regular run of like or similar events.

Section 6 of LI 2025/D22 provides that, for the purposes of s 40-165(1), the maximum number of fund-raising events that can be held by an entity before forming any part of a series or regular run of like or similar events is 15 in any prescribed accounting year.

Where the maximum number of like or similar fund-raising events is exceeded in a prescribed accounting year, the entity is not able to choose to treat supplies made in connection with any of the events held in that prescribed accounting year as being input-taxed.

This means that an entity covered by LI 2025/D22 that holds 16 or more like or similar fund-raising events, in a prescribed accounting year, cannot choose to treat supplies made in connection with any of the like or similar fund-raising events, held in that prescribed accounting year, as being input-taxed. The entity must remit GST on supplies made in connection with all like or similar fund-raising events held (including the first 15 events held) in that prescribed accounting year.

The prescribed accounting year of an entity is defined in LI 2025/D22 to mean the 12-month period ending on the date the entity balances its accounts. A prescribed accounting year is used instead of a financial year (1 July to 30 June) because these types of entities may have a different 12-month period in which they balance their accounts.

LI 2025/D22 is to commence on the day after it is registered on the Federal Register of Legislation.

## Recent case decisions

### 6. Land development: GST liability

The ART has held that a taxpayer, an individual, was liable for GST on the sales of subdivided land on the basis that the sales were made in the course or furtherance of an enterprise (as defined for the purposes of GST) carried on by the taxpayer (*VZFS and FCT*<sup>1</sup>).

The land comprised some 70 hectares of rural land in a location on the outskirts of Adelaide which, by the 1980s, had become an outer suburb of Adelaide. The subdivision resulted in the creation and sale of over 750 housing lots. The development works included infrastructure such as the construction of streets, the provision of utilities and stormwater management, public spaces, provision for a childcare centre, and a sound barrier on the estate's boundary.

The land had been farmed by the taxpayer's family for generations. The taxpayer entered into an agreement with a developer (the developer) under which the developer, at its own cost: sought re-zoning and development approvals; carried out or caused the development works to be carried out; and marketed the subdivided lots. The taxpayer progressively gave the developer access to the property as required and signed documents where necessary as owner, including contracts for the sale of the subdivided lots.

As the agreement came to be framed, the taxpayer received 20% of the proceeds of sale progressively as sales of the subdivided lots were completed, the developer receiving the remaining 80%.

Although acknowledging that the taxpayer's role was, relative to the developer's, significantly more passive in nature, the ART concluded that the activities carried out by the taxpayer were nevertheless such as to characterise the sales of the subdivided lots as made in the course or furtherance of an enterprise carried on by the taxpayer.

The ART said that the taxpayer's case was essentially that his role was passive, and such rights as he had and actions he took under the agreement were of an administrative nature not amounting to a series of activities in the form of a business or an adventure or concern in the nature of trade. The ART then said that it was appropriate to examine what the taxpayer actually did in relation to the development. In this regard, the ART listed the following:

- the taxpayer entered into a commercial agreement for the re-zoning, development, subdivision and sale of the land which bound the developer to carry out the development works and other activities at very substantial costs in return for which the taxpayer received 20% of the sale proceeds. The ART considered that it was reasonable to describe the development agreement as a sophisticated commercial agreement;
- the development, which the taxpayer caused to occur by entering into and discharging its obligations under the

agreement, transformed the land both physically and legally from farming land to a large modern residential estate of over 750 residential allotments with substantial infrastructure and amenities;

- the taxpayer facilitated the development and sale of the land by: progressively granting access to the developer; executing documentation required for the developer to seek re-zoning and development approvals; committing to, and actually, refraining from encumbering or selling the land for an extended period; and executing over 700 sale contracts or allowing contracts to be executed under power of attorney;
- the taxpayer became the registered proprietor of the newly created lots. It was the taxpayer with whom the purchasers entered into contracts to purchase the lots and from whom title to the lots was transferred;
- the taxpayer engaged accountants to review the settlement statements for each and every one of the hundreds of sales; and
- the taxpayer filed business activity statements and paid amounts as GST over the sales phase of the development, which would require the taxpayer to account for GST on in excess of 750 sales over an extended period.

The ART then said that these activities exhibited some of the well-known indicia of a business and referred to the following features:

- although the entry into the development agreement was a one-off action, the taxpayer's activities in facilitating its implementation were not. They had a degree of regularity and repetition;
- the development agreement was a sophisticated commercial arrangement;
- in that regard, the taxpayer re-negotiated the terms of the agreement that were directly relevant to their commercial return. The taxpayer gave up 5% of the sale proceeds when agreeing to reduce their return from 25% to 20% of the sale proceeds. The taxpayer also gave up entitlement to a minimum amount of \$35,000 per lot that previously applied and agreed to allow more years to pass before the taxpayer would be able to exercise an option to sell the land;
- the taxpayer monitored the performance of the project to the extent that such performance could affect the financial outcome of the project for the taxpayer by way of receiving regular updates by the developer and, in particular, monitoring sales proceeds for each sale with professional assistance; and
- the taxpayer's activities were on a substantial scale. The taxpayer's obligation to grant the developer access to the land and refrain from dealing inconsistently with the agreement applied and was discharged over an extended period. The taxpayer's monitoring of the project was also ongoing over an extended period, both in terms of progress of the development by way of updates from the developer, and the taxpayer's returns by way of causing the taxpayer's accountants to review every settlement

statement as they were progressively received. The taxpayer's engagement in signing contracts was significant, involving hundreds of sale contracts.

As indicated, the taxpayer brought GST to account on the sales in their returns, then objected to the resulting deemed assessments of net amounts. It was the decisions of the Commissioner disallowing objections against the deemed assessments that were before the ART for review. It is not known whether the contracts in the case before the ART contained any provision in relation to the operation of the GST margin scheme.

It is important to keep in mind that, where land that is a capital asset (as the land was in the case considered above) is developed, subdivided and sold, potential issues will arise on two fronts, income tax and GST. The basic GST issue is whether the activities undertaken amount to the carrying on of an "enterprise" (as defined in the GSTA99). The basic income tax issue is whether the activities undertaken amount to more than the mere realisation of a capital asset. These two concepts (enterprise and mere realisation) have a substantial overlap. The Commissioner has set out his views on the statutory concept of an enterprise in MT 2006/1.

The ordinary income tax issues that arise in relation to the development and subdivision of farmland were recently considered by the Federal Court (Wheelahan J) in *Morton v FCT*.<sup>2</sup> The Commissioner has appealed to the Full Federal Court from the decision of Wheelahan J.

It would not be surprising if the taxpayer were to appeal to the Federal Court from the decision of the ART in the VZFS case.

## 7. Default assessments

A recent decision of the ART provides a further example of the difficulties that a taxpayer can encounter when seeking to discharge the onus of proving that a default assessment is excessive or otherwise incorrect (*Olow and FCT*<sup>3</sup>).

The taxpayer was the sole director, shareholder and controlling mind of a company that operated a childcare business between 2013 and 2016 across the western suburbs of Sydney. In 2018, after conducting concurrent audits into the affairs of the taxpayer and his company, the Commissioner concluded that, over the period 1 July 2014 to 30 June 2016, the taxpayer, as the sole signatory on the company's accounts, had likely been the beneficiary of:

- significant cash withdrawals which had been made from the company's accounts; and
- payments which had been made by the company for goods and services which were of a private or domestic nature.

The Commissioner considered that the withdrawals and payments constituted income in the hands of the taxpayer which he had not reported in his income tax returns, and he raised amended income tax assessments and administrative tax shortfall penalty assessments for the income years ending 30 June 2015 and 30 June 2016 (the relevant

income years). The amended assessments and penalty assessments increased the taxpayer's tax liability for the relevant income years by \$780,682.

The taxpayer objected to the amended assessments and penalty assessments, and the Commissioner wholly disallowed the taxpayer's objections. The taxpayer then applied to the ART for a review of the Commissioner's objection decisions.

In its decision dismissing the taxpayer's application, the ART said that, to be successful in the review, the taxpayer would need to discharge the statutory burden of proving (on the balance of probabilities) not simply that the Commissioner's amended assessments and penalty assessments were wrong or excessive, but what those assessments should have been. The ART held that the taxpayer had not discharged this burden of proof.

During the relevant income years, the company reported the employment of up to 36 employees and the provision of goods and services valued at around \$16 million, receiving around \$15.9 million in "government childcare assistance fees" in response.

The ART said that the manner in which the business was operated was somewhat obscure, but at a high level, it appeared that the company maintained a central office which was staffed by a number of staff members which included among its ranks the taxpayer's wife and children. The company appeared to have then engaged a number of "carers to look after children from their homes" under the supervision of the company. This supervision was undertaken by the taxpayer, a "coordinator" and the taxpayer's wife who explained in an affidavit that she liaised with family daycare carers and conducted "inspections of the carer's premises to ensure that the premises remain compliant with relevant laws".

The taxpayer and the company shared a tax accountant, JK Accounting Pty Ltd, which lodged income tax returns on their behalf which showed that, from working for the company in the 2015 income year, the taxpayer's reported taxable income was \$129,242 and the taxpayer's wife and his two children each had a reported taxable income of \$149,501. In respect of the 2016 income year, the taxpayer reported taxable income in respect of his work for the company of \$37,369, while his wife reported \$26,643 and his children reported \$14,837 and \$9,501.

The Commissioner acquired copies of account statements for three Westpac Banking Corporation accounts and a Commonwealth Bank account held by the company covering the relevant years. Each of those accounts identified the taxpayer as the sole signatory, and an analysis of the account statements for each showed that there had been a significant number of:

- unexplained cash withdrawals; and
- purchases of goods and services which appeared to be private and domestic in nature rather than the type of expenses one would typically expect to see in the accounts of a childcare service provider.

Among the purchases were amounts paid from the company's accounts for school fees, food, clothing items, private travel and traffic fines. Together with the unexplained cash withdrawals, the seemingly private expenses totalled \$655,692 and \$414,389 in the 2015 and 2016 income years.

The Commissioner formed the view that the nature of the withdrawals and expenses led to the conclusions that:

- such amounts in the hands of the taxpayer were likely assessable ordinary income; and
- the taxpayer had been reckless in not returning such amounts as part of his income in each of the relevant income years.

The taxpayer objected to the amended assessments (and the penalty assessments), arguing that the cash withdrawals were amounts withdrawn on behalf of his family members for salary and wages payable for work that they had done within the business. Other amounts, it was alleged, were repayments made to the taxpayer in respect of loans he had previously advanced to the company.

The Commissioner remained unconvinced that the amounts were salary payable to family members, pointing to a

lack of clarity as to what each family member did for the business and how much each was expected to be paid. The Commissioner also did not accept the contention that certain amounts and expenses paid by the company for the taxpayer's private expenses were simply repayments of loan advances that the taxpayer had made to the company. The Commissioner pointed to a lack of detail, the absence of loan agreements or any sense of record-keeping as being matters that prevented him from being satisfied that such loans existed.

The ART concluded that it was clear that the taxpayer had not and could not discharge the burden of proving the amount of his taxable income in each of the relevant years.

**TaxCounsel Pty Ltd**  
ACN 117 651 420

#### References

- 1 [2025] ARTA 2013.
- 2 [2025] FCA 336.
- 3 [2025] ARTA 1924.



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## Tax Tips

by TaxCounsel Pty Ltd

# Pre- or post-CGT asset?

In a recent decision, the ART considered the special CGT rules that can operate to treat a pre-CGT asset of a company or trust as being a post-CGT asset.

## Background

In the case of the disposal of a CGT asset, the commencement of the CGT regime in Australia was effectively fully prospective in that CGT could only be attracted if the asset being disposed of was acquired after the CGT commencement date (19 September 1985).<sup>1</sup>

In practical terms, without more, this could have raised potential issues in relation to a CGT asset that was acquired by a company or the trustee of a trust on or before the commencement date. The issues would have arisen out of the fact that, without appropriate provisions, the effective ownership of such an asset could be disposed of after the commencement date without the asset becoming a post-CGT asset of the company or trust. For example, in the case of a company, there could be a disposal of the shares in the company or, in the case of a trust, there could be a disposal of the “ownership” of the trust by a change in the control of the trust and the beneficiaries.

The original CGT provisions (Pt IIIA ITAA36) and the rewritten CGT provisions (Pts 3-1 and 3-3 ITAA97) both contain provisions in similar terms that are intended to address these commencement issues. For convenience, these provisions are referred to as the “special CGT company and trust commencement provisions”.

Over the years, there has not been any substantive developments that have affected the special CGT company and trust commencement provisions. The Commissioner issued a non-binding ruling (IT 2340) in July 1986 in relation to the ITAA36 provisions. Recently, and importantly, on 3 October 2025, the operation of the special CGT company and trust commencement provisions in the ITAA97 were considered by the ART in *XLZH and FCT*.<sup>2</sup> This article considers this decision.

## The facts

The relevant facts of the *XLZH* case were as follows.

1. the taxpayer was a beneficiary of a discretionary trust (referred to by the ART as the Settlement Trust) that was settled by a deed made in August 1977<sup>3</sup> (the trust

deed). The Settlement Trust was a discretionary trust as to income and capital, and the trustee was X Pty Ltd (the trustee). At all relevant times, the directors of X Pty Ltd were the taxpayer and her husband (H) and they each held one share in the company (being all of the shares on issue);

2. H was the “nominator” under the trust deed and, in that capacity alone, controlled who was to be appointed as a beneficiary of the Settlement Trust, but could not nominate himself as a beneficiary;
3. the beneficiaries of the Settlement Trust (as at the date of settlement) were the family members of the taxpayer and H. The trust deed provided for an open class of beneficiaries but at no point in time was H a beneficiary of the Settlement Trust;
4. in or around July 1979, X Pty Ltd, as trustee of the Settlement Trust, commenced to carry on a business (the business);
5. in mid-June 1988, a company (Alpha Pty Ltd (Alpha)) was incorporated. On incorporation, the taxpayer and H held the two subscriber shares. In or around late June 1988, X Pty Ltd, as trustee of the Settlement Trust, acquired the two ordinary shares in Alpha. From late June 1988 until late July 2019, the directors of Alpha included the taxpayer and H;
6. on 1 July 1988, the business assets (except for debtors, stock and fixed assets) were transferred by X Pty Ltd, as trustee of the Settlement Trust, to Alpha which then operated the business;
7. on 10 June 2011, a company (Beta Pty Ltd (Beta)) was appointed as a beneficiary of the Settlement Trust. It was the Commissioner’s argument that this appointment caused the “majority underlying interests” in the assets of the Settlement Trust (the Alpha Shares) to stop being pre-CGT assets;
8. at all relevant times, the taxpayer and H were the directors of Beta. The sole share on issue in Beta was at all relevant times held by another company (Delta Pty Ltd (Delta)), as trustee of the Delta Trust. Beta was not prevented from distributing to its member (Delta, as trustee for the Delta Trust). That is, Beta was not an “ultimate owner” as defined; and
9. Delta was incorporated in April 2011 and had two ordinary shares on issue which were held at all relevant times by the taxpayer and H, who had also been the directors of Delta. The Delta Trust was a hybrid trust in which there were “unitholders”, and the taxpayer and H were at all relevant times the two unitholders. The other individual discretionary objects of the Delta Trust were all family members of the taxpayer and H, or entities which could benefit those family members. The taxpayer and H controlled the distributions of the Delta Trust. As the Delta Trust could not be an “ultimate owner” as defined, it was necessary to additionally trace or look through Beta and the Delta Trust to determine the “ultimate owners” of the asset of the Settlement Trust (the Alpha shares).

## Disposal of the Alpha shares

On 19 July 2019, the trustee of the Settlement Trust disposed of its shares in Alpha to an unrelated third party for in excess of \$100,000,000, at which time, the taxpayer and H resigned as directors. The disposal of the shares in Alpha gave rise to the happening of CGT event A1 (s 104-10 ITAA97).

## Distribution to the taxpayer from the Settlement Trust

In the 2020 income year, the trustee of the Settlement Trust distributed an amount of \$64,405,094 to the taxpayer as a beneficiary of the Settlement Trust. It was common ground that this distribution was in connection with the proceeds of the disposal of the Alpha shares. The issue in the case was whether this capital gain was to be disregarded on the basis that the shares were pre-CGT assets.

## Distributions to Beta from the Settlement Trust

Since the appointment of Beta as a beneficiary of the Settlement Trust on 10 June 2011 (see (7) above), up to and including the 2020 income year, H did not, in any income year, receive or become entitled to receive an amount equal to or greater than 50% of income referable to dividends paid in respect of the Alpha shares.

In respect of the 2020 income year, the taxpayer was entitled to the whole of the trust income of the Settlement Trust, including the capital gain arising from the trustee's sale of the Alpha shares. The Delta Trust reported no income.

Dividends of \$24,094,000 in respect of the 2009 to 2019 income years were paid by Alpha to the Settlement Trust, and between 44% and 75% of those amounts were distributed to Beta. This was equivalent to 63% across those income years.

## The legislation

The relevant provisions in the ITAA97 that deal with the commencement date issues are contained in Div 149 ITAA97. That Division contains rules that provide the circumstances in which a pre-CGT asset of a company or trust may cease to be a pre-CGT asset of the company or trust. The rules operate by reference to the "underlying interests" of an "ultimate owner". The particularly relevant provisions of Div 149 ITAA97 are as follows:

### "Subdivision 149-A – Key concepts

...

#### 149-15 Majority underlying interests in a CGT asset

(1) *Majority underlying interests* in a CGT asset consist of:

- (a) more than 50% of the beneficial interests that ultimate owners have (whether directly or indirectly) in the asset; and

- (b) more than 50% of the beneficial interests that ultimate owners have (whether directly or indirectly) in any ordinary income that may be derived from the asset.

(2) An *underlying interest* in a CGT asset is a beneficial interest that an ultimate owner has (whether directly or indirectly) in the asset or in any ordinary income that may be derived from the asset.

(3) An *ultimate owner* is:

- (a) an individual; or
- (b) a company whose constitution prevents it from making any distribution, whether in money, property or otherwise, to its members; or
- (c) the Commonwealth, a State or a Territory; or
- (d) a municipal corporation; or
- (e) a local governing body; or
- (f) the government of a foreign country, or of part of a foreign country.

(4) An ultimate owner *indirectly* has a beneficial interest in a CGT asset of another entity (that is *not* an ultimate owner) if he, she or it would receive for his, her or its own benefit any of the capital of the other entity if:

- (a) the other entity were to distribute any of its capital; and
- (b) the capital were then successively distributed by each entity interposed between the other entity and the ultimate owner.

(5) An ultimate owner *indirectly* has a beneficial interest in ordinary income that may be derived from a CGT asset of another entity (that is *not* an ultimate owner) if he, she or it would receive for his, her or its own benefit any of a dividend or income if:

- (a) the other entity were to pay that dividend, or otherwise distribute that income; and
- (b) the dividend or income were then successively paid or distributed by each entity interposed between the other entity and the ultimate owner.

### Subdivision 149-B – When asset of non-public entity stops being a pre CGT asset

#### 149-25 Which entities are affected

This Subdivision provides for when a CGT asset of an entity stops being a pre-CGT asset (unless the entity is covered by section 149-50).

Note: Subdivision 149-C deals with when an asset of such an entity stops being a pre-CGT asset.

#### 149-30 Effects if asset no longer has same majority underlying ownership

(1) The asset stops being a pre-CGT asset at the earliest time when majority underlying interests in the asset were *not* had by ultimate owners who had majority

underlying interests in the asset immediately before 20 September 1985.

- (1A) Also, Part 3-1 and this Part (except this Division) apply to the asset as if the entity had acquired it at that earliest time.
- (2) If the Commissioner is satisfied, or thinks it reasonable to assume, that at all times on and after 20 September 1985 and before a particular time majority underlying interests in the asset were had by ultimate owners who had majority underlying interests in the asset immediately before that day, subsections (1) and (1A) apply as if that were in fact the case.

...

#### 149-35 Cost base elements of asset that stops being a pre-CGT asset

- (1) This section affects the cost base and reduced cost base of the asset if it stops being a pre-CGT asset.
- (2) The first element of each is the asset's market value at the time referred to in subsection 149-30(1)."

### The Commissioner's approach

The Commissioner considered that it was open to adopt the position (contrary to that of the taxpayer) that beneficiaries of a family discretionary trust can, *all together*, have "beneficial interests" and, therefore, "majority underlying interests". On this basis, the Commissioner argued that continuity of "majority underlying interests" for the purposes of Subdiv 149-B ITAA97 where the trust continues to be administered for the benefit of the same family members, both pre-CGT and throughout the test period, can be measured.

Accordingly, the Commissioner considered that the Alpha shares remained pre-CGT assets until 10 June 2011 when H (who was not previously a direct or indirect beneficiary of the Settlement Trust) became a person possibly able to benefit from the Alpha shares, indirectly via Beta and the Delta Trust. The Commissioner claimed that the Alpha shares ceased to be a pre-CGT asset for the purposes of s 149-30(1) ITAA97 on that date.

### The ART decision

The ART concluded that it was satisfied, or thought it reasonable to assume, that, at all times on and after 20 September 1985 and before 10 June 2011, majority underlying interests in the Alpha shares were had by ultimate owners who had majority underlying interests in the Alpha shares immediately before 10 June 2011 for the purposes of s 149-30(2) ITAA97. Consequently, the Alpha shares continued to retain their pre-CGT status, and the assessment issued to the taxpayer was excessive. In giving its reasons for this conclusion, the ART made a number of points, including the following.

The ART said<sup>4</sup> that, once it was accepted that Subdiv 149-B ITAA97 applies to assets held by a discretionary trust

(as a trust is an "entity" as defined for tax purposes), the provisions in Subdiv 149-B ITAA97 have to be read as permitting a sensible identification of whether an asset of a discretionary trust has stopped being a pre-CGT asset. This was notwithstanding the fact that discretionary objects cannot have a beneficial interest, at law, in the assets of the trust. It was incontrovertible that, at law, no beneficiary is entitled to income or capital of a discretionary trust until the trustee exercises their discretion to distribute income or to make an appointment of capital to that beneficiary.

The ART then went on:

"79. However, in my view, for the purposes of applying s 149-30 of the ITAA 1997, the 'ultimate owners' in the case of an asset of a discretionary trust are deemed to have interests in the trust's assets akin to ownership interests. That is, the statutory provisions, in particular, subs 149-15(4) and (5) adopt a non-technical meaning of the phrase 'beneficial interest'. For the purposes of Subdivision 149-B, the 'ultimate owners' are *taken* to effectively have ownership interests in the assets of a discretionary trust on the basis that they *may benefit*. This is achieved by the conditional language used in subsections 149-15(4) and (5) ... As can be seen from the statutory provisions ..., the hypothetical premises are that distributions of capital and income of the trust are made to 'ultimate owners' whether directly or indirectly. The absence of a definition of 'beneficial interests', particularly in a statutory context where there are numerous other definitions, reinforces my view that the words 'beneficial interests' are to be interpreted more broadly for the purposes of Division 149. IT 2340, a ruling issued by the Commissioner ... also supports this view ..."

The ART said that it disagreed with the Commissioner's related argument that there was a change in the "majority underlying interests" because there was a change in the group of discretionary objects of the Settlement Trust when Beta was added as a discretionary object.<sup>5</sup> Pursuant to s 149-15(4) and (5), it was impossible to establish whether there was a change of the requisite degree even if a group of discretionary objects were chosen as the test group. This was because it would be necessary to know the percentage beneficial interest of each "ultimate owner". The ART acknowledged that the Commissioner's argument would be right if there were, for example, the appointment of an entirely new group of discretionary objects not forecast in the trust deed, but that was not the present case.

Later, the ART said that, critically, s 149-30(2) ITAA97 is an entirely concessional provision as was evident from its statutory context and language and, therefore, it "should be construed beneficially".<sup>6</sup> The statutory context made it clear that s 149-30(2) applied as an exception to s 149-30(1), which may *prima facie* apply. The fact that s 149-30(1) was extraordinarily difficult to apply in certain circumstances, including with respect to discretionary trusts, informed the "beneficial" interpretation of s 149-30(2).

## Observations

It is not known whether the Commissioner will seek to appeal to the Federal Court from the decision of the ART in the *XLZH* case.

An appeal to the Federal Court would only be competent if a question of law were involved.<sup>7</sup> The question of law requirement should not raise any practical problem to the extent that the issues relate to the proper construction of the provisions of Div 149 ITAA97. However, whether the Commissioner “is satisfied or considers it reasonable to assume” in accordance with s 149-30(2) ITAA97 (see above) would be a matter for the Commissioner (or the ART on a review of the Commissioner’s decision), unless the decision of the Commissioner (or the ART) were to display an error of law.

Expressions such as beneficial ownership or (as in Div 149 ITAA97) beneficial interest in relation to an asset are apt to raise issues where the asset is an asset of a non-fixed trust. Where a discretion is conferred on the Commissioner, there will be a fundamental issue in some cases as to whether, in the particular statutory context, the question of beneficial ownership or beneficial interest is effectively intertwined with the Commissioner’s overall discretionary power so that the content of the concept (beneficial ownership or beneficial interest) would be a matter in respect of which the Commissioner effectively has a discretion. It would seem that, in the *XZLH* case, the ART took this to be the correct

construction of the provisions of Div 149 ITAA97 (and of s 149-20(2) ITAA97 in particular). If this is correct, it could make the question of whether there is a question of law more difficult to establish.

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### References

- 1 Former s 160L of the *Income Tax Assessment Act 1936* (Cth) (ITAA36); Div 149 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).
- 2 [2025] ARTA 2154.
- 3 This was some eight years before the start date (20 September 1985) of the CGT provisions of the income tax law.
- 4 [2025] ARTA 2154 at [78].
- 5 [2025] ARTA 2154 at [81].
- 6 *Eichmann v FCT* [2020] FCAFC 155.
- 7 S 172 of the *Administrative Review Tribunal Act 2024* (Cth).

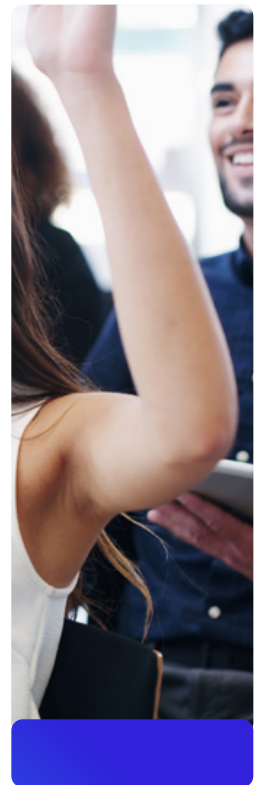
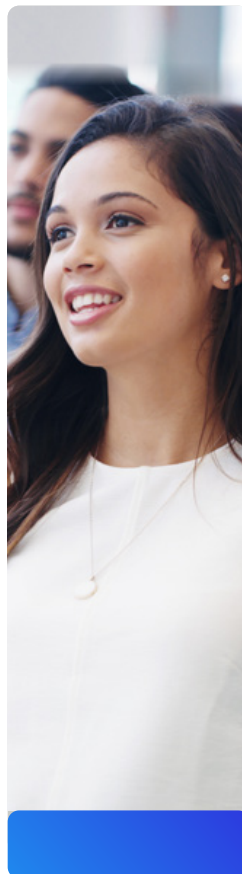


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### Ryan Attard

Manager

Grant Thornton, Sydney



### From Graduate to Manager in record time

Ryan started his tax career as a fresh graduate in PwC's corporate team in 2022, after having completed a Bachelor of Commerce, majoring in Accounting and Finance, and with ambitions to reach great heights in tax. He joined Grant Thornton in 2024, and by the time we caught up with him in late 2025, he'd been promoted from Senior Associate to Manager.

The trajectory might seem meteoric, but Ryan attributes it to something more fundamental than talent alone.

"During my career, I've been fortunate to learn from senior colleagues who took the time to mentor me," he reflects.

"I also try to do the same for the junior members of my team."

His achievement as Dux of [ATL004 CTA2B Advanced](#), a key component of the [Chartered Tax Adviser \(CTA\) Program](#) that he's currently pursuing, is testament to his dedication to mastering tax at the highest level.

### Why tax?

Everyone's decision to work in tax and their journey to get there is unique to them. In Ryan's case, it was his love of the law and his desire to test his impressive talent of problem-solving.

"It's a field that never stays still. You always have to think ahead. The law changes, businesses evolve, and each day is different from the last."

Ryan's approach to his work is admirable, but the intellectual challenge alone wouldn't be enough. What keeps Ryan engaged is the impact. "Good advice helps people make informed decisions. That's what I find rewarding: helping people make sense of rules that can be complex and ambiguous so that they can make the best decision."

### On the journey to seeing tax through clients' eyes

His ambition to elevate his career further is in his undertaking of the CTA Program. Ryan's decision to pursue the CTA designation wasn't about adding letters after his name. It was strategic, driven by a realisation about how clients actually experience tax.

"I chose to study with The Tax Institute because it's practical and directly relevant to my work," he explains.

"I like that it gives me a broader view of the tax system. Working primarily in corporate tax, it's easy to become specialised in one area. But clients don't experience tax in silos, so they need someone who understands the full picture."

### The road ahead

Naturally, Ryan's next step is completing the full CTA Program but he is already thinking beyond that milestone.

"Tax is a field that requires ongoing learning, whether through formal study or simply keeping up with legislative changes and thinking critically about how they apply in practice, and I look forward to keep going with this throughout my career."

It's this mindset that separates those who merely work in tax from those who shape its future. Ryan doesn't see learning as a phase to complete. He sees it as the foundation of a career built on providing genuinely valuable advice to clients who need someone capable of seeing the whole picture. And in a field that never stays still, that understanding is what matters most.

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# Business restructures using the small business CGT concessions

by Karen Goodfellow, CTA, Principal,  
Goodfellow Tax Advisory

This article considers the small business CGT concessions in Div 152 of the *Income Tax Assessment Act 1997* (Cth) in the context of business restructuring. In contrast to the “traditional” restructure roll-overs, the concessions are a legitimate option, for those lucky enough to be eligible, to permanently eliminate the tax otherwise payable when CGT events happen in connection with a restructure. The article compares and contrasts the concessions with the more traditional CGT roll-overs, and outlines some of the reasons for and against choosing to apply the concessions (where available) rather than one of the roll-overs. Specific issues relating to the small business 15-year exemption and the small business retirement exemption are also canvassed. It then goes on to discuss some of the particular issues that might arise when the small business CGT concessions are applied to a business restructure. Lastly, some considerations relevant to preserving access to the concessions in the new structure are touched on.

## Introduction

There are likely to be a number of factors driving a decision to restructure an ongoing business, of which ongoing tax efficiencies may be one.

Once a decision is made to restructure an ongoing business, the most important task is often to chart the most tax-effective course from the business’ existing operating structure to its target structure. Provided that continuity of economic ownership is maintained (broadly speaking), there are a number of CGT roll-overs that may be available to defer the tax liability that might otherwise be triggered by the restructure.

Sometimes overlooked, however, is the availability of the small business CGT concessions in Div 152 of the *Income Tax*

*Assessment Act 1997* (Cth) (ITAA97), by those who are eligible, to permanently eliminate the tax otherwise payable when CGT events happen in connection with a restructure. The purpose of this article is to outline some of the reasons the small business CGT concessions might be preferred to using a CGT roll-over, and to discuss some of the tips and traps that might arise from a decision to use the small business CGT concessions in the context of a business restructure.

## Small business CGT concessions

### Overview

Division 152 contains CGT concessions that are available to entities that are, in broad terms, considered small businesses. These concessions enable a capital gain that arises from a CGT event to be disregarded, reduced or deferred under the small business CGT concessions, provided that certain conditions are satisfied (see Table 1).

The four available small business CGT concessions are:

1. the 15-year exemption (Subdiv 152-B ITAA97);
2. the small business 50% reduction (Subdiv 152-C ITAA97);
3. the retirement exemption (Subdiv 152-D ITAA97); and
4. the small business roll-over (Subdiv 152-E ITAA97).

The basic conditions contained in Subdiv 152-A ITAA97 must be satisfied in order for any of these concessions to be available. The taxpayer may also need to satisfy additional requirements to qualify for a specific concession.

The basic conditions are as follows:

- a CGT event must happen in relation to an asset that the taxpayer owns (s 152-10(1)(a));
- the event would otherwise have resulted in a capital gain (s 152-10(1)(b));
- at least one of the following applies (s 152-10(1)(c)):
  - the taxpayer is a *CGT small business entity* for the income year;
  - the taxpayer satisfies the *maximum net asset value test*;
  - the taxpayer is a partner in a partnership that is a CGT small business entity and the asset is an interest in an asset of the partnership; or
- (broadly) the CGT asset concerned is used in the business of a connected entity of an affiliate of the taxpayer that is a CGT small business entity; and
- the CGT asset satisfies the *active asset test* (s 152-10(1)(d)).

If the asset is a share in a company or an interest in a trust, a number of additional conditions must be satisfied (s 152-10(2)).

## Business restructure: roll-over or sale to which Div 152 is applied

When restructuring an ongoing business, there a number of “traditional” roll-overs that, depending on the

Table 1. Summary of concessions

Concession	Description	ITAA97 reference
15-year exemption	<p>An <b>individual</b> is entitled to a full exemption if:</p> <ul style="list-style-type: none"> <li>the <i>basic conditions</i> are satisfied;</li> <li>the asset has been owned continuously for over 15 years;</li> <li>if the CGT asset is a share in a company or an interest in a trust, the company or trust must have had a <i>significant individual</i> for a total of 15 years during which it owned the CGT asset; and</li> <li>the taxpayer is at least 55 years of age and the CGT event happens in connection with the retirement of the taxpayer, or the taxpayer is permanently incapacitated at the time of the event.</li> </ul> <p>A <b>company or trust</b> is entitled to a full exemption if:</p> <ul style="list-style-type: none"> <li>the <i>basic conditions</i> are satisfied;</li> <li>the asset has been held continuously for over 15 years;</li> <li>the taxpayer had a <i>significant individual</i> for a total of 15 years during the period of ownership; and</li> <li>a <i>significant individual</i> just before the CGT event is at least 55 years of age and the CGT event happens in connection with the retirement of the taxpayer, or the taxpayer is permanently incapacitated at the time of the event.</li> </ul>	Subdiv 152-B
Small business 50% reduction	<p>If the <i>basic conditions</i> are satisfied, the taxpayer is able to reduce the capital gain on <i>active assets</i> by 50%.</p> <p>It is not compulsory to apply the small business 50% reduction.</p>	Subdiv 152-C
Retirement exemption	<p>An <b>individual</b> taxpayer may disregard a capital gain if:</p> <ul style="list-style-type: none"> <li>the <i>basic conditions</i> are satisfied; and</li> <li>if the taxpayer is under 55, the proceeds from the event are rolled over into a complying superannuation fund.</li> </ul> <p>A <b>company or trust</b> may disregard a capital gain if:</p> <ul style="list-style-type: none"> <li>the <i>basic conditions</i> are satisfied;</li> <li>the taxpayer has a <i>significant individual</i> just before the CGT event;</li> <li>a payment is made to a <i>CGT concession stakeholder</i>; and</li> <li>if the recipient of the payment is under 55, the payment must be made to the <i>CGT concession stakeholder</i> by contributing it to a complying superannuation fund.</li> </ul> <p>There is a lifetime limit of \$500,000 on the amount which can be treated as exempt for any one individual.</p>	Subdiv 152-D
Small business roll-over	<p>If the <i>basic conditions</i> are satisfied, a taxpayer may roll-over a capital gain against the acquisition of a replacement business asset.</p> <p>The capital gain is crystallised when the replacement asset ceases to be held as an <i>active asset</i>.</p>	Subdiv 152-E

circumstances, might be available to shelter the capital gain and balancing adjustment consequences of the transactions that the restructure brings about (although rarely the trading stock consequences):

- Div 122 ITAA97: roll-over for the disposal of assets to, or the creation of assets in, a wholly owned company;
- Subdiv 124-M ITAA97: scrip-for-scrip roll-over;
- Subdiv 124-N ITAA97: disposal of assets by a trust to a company;
- Subdiv 328-G ITAA97: restructures of small businesses; and
- Div 615 ITAA97: roll-overs for business restructures.

For eligible taxpayers, the small business concessions in Div 152 are an alternative to using one of these a “traditional” roll-overs. Table 2 outlines some of the considerations that may be relevant to choosing which path to take.

## Reasons for using the small business CGT concessions to restructure a business

### Results in an uplift in cost base

As the small business CGT concessions are not a roll-over (which is essentially just a tax deferral), the recipient of the business assets will have a market value cost base for those assets. In the event that a later sale of the business cannot benefit from the concessions (perhaps because the business has outgrown the small business CGT concessions, or all eligible CGT concession stakeholders have utilised their \$500,000 lifetime retirement exemption limit), this uplift in cost base delivers a permanent tax saving.

### Access to superannuation CGT cap

Provided certain hoops are jumped through, the proceeds from the 15-year exemption and/or the gain from the retirement exemption can be contributed to superannuation

**Table 2. Choosing whether to use Div 152**

Consideration	Comment
Whether the business is pre-CGT.	If the business is pre-CGT, most roll-overs ensure that the business assets retain their pre-CGT assets in the hands of the company.
Whether the following basic conditions for small business CGT relief are satisfied: <ul style="list-style-type: none"> <li>the taxpayer is a CGT small business entity or it passes the \$6 million net asset test; and</li> <li>the CGT assets are active assets.</li> </ul>	If the originating entity does not satisfy the basic conditions for the small business CGT concessions, one of the traditional roll-overs will need to be considered.
Whether the small business 15-year exemption can be accessed by the taxpayer: <ul style="list-style-type: none"> <li>Have the relevant assets been owned by the taxpayer for at least 15 years?</li> <li>Has the taxpayer had a significant individual for at least 15 years during which it owned the asset?</li> <li>Is a significant individual of the taxpayer 55 or over and retiring (or permanently incapacitated)?</li> </ul>	If the taxpayer can access the small business 15-year exemption, the capital gain will be permanently disregarded in its entirety.
Whether the small business retirement exemption can be accessed by the taxpayer: <ul style="list-style-type: none"> <li>Does the taxpayer satisfy the significant individual test (ie does an individual have a 20% “interest” in the taxpayer just before the CGT event)?</li> <li>Does the taxpayer have access to sufficient cash to contribute capital proceeds to superannuation?</li> <li>Are CGT concession stakeholders who are under 55 amenable to having all or part of the gain contributed to superannuation?</li> </ul>	If the taxpayer can access the small business retirement exemption, its capital gain will be permanently disregarded (up to a lifetime limit of \$500,000 for each CGT concession stakeholder in the entity).
Are there external circumstances which may render the structuring requirements of a particular roll-over inappropriate or unacceptable? For example, Subdiv 122-A ITAA97, which is available only if the target structure is a company wholly owned by the original business entity, would not be suitable for restructuring from a trust to a company if industry regulations require the company to be completely or partially owned by individual shareholders.	Roll-over relief under Subdiv 122-A will not be available where the requirements are not satisfied. Div 152 provides significantly greater flexibility in terms of how the target structure looks.
Does the restructure involve a transfer of depreciating assets?	Balancing adjustment roll-over relief for the transfer of depreciating assets is available in connection with some, but not all, roll-overs. Division 152 does not provide balancing adjustment relief.
Does the restructure involve a transfer of trading stock?	With the exception of the small business genuine restructure roll-over in Subdiv 328-G, neither a traditional roll-over nor Div 152 will provide relief from the operation of s 70-90 ITAA97 (which deems trading stock disposed of outside the ordinary course of business, as would be the case in the context of a restructure, to be disposed of at market value).

outside the “standard” contribution caps (s 292-100 ITAA97). Instead, such contributions can be made up to the CGT cap (\$1.865 million for the 2025–26 income year).

### Complete flexibility in structuring transactions

All CGT roll-overs (leaving the replacement asset roll-over in Div 152 aside) can be accessed only if certain conditions are met by the target structure. For example, the roll-over provided by Subdiv 122-A is available only if the individual or trustee from which the relevant business is being restructured “out of” owns all of the shares in the transferee company. Similarly, the small business restructure roll-over in Subdiv 328-G is available only if the ultimate economic ownership of the asset(s) is maintained.

The small business CGT concessions in Div 152, while subject to several conditions that must be satisfied by the taxpayer entity, have no concern with the attributes of the target structure. In particular:

- the transferee entity need not be “small” for Div 152 purposes (ie it can be worth \$6 million or more, or have an annual turnover exceeding \$2 million) – unless the transferee and transferor are connected entities or affiliates;
- the underlying owners of the asset following the restructure need not bear any similarity to the underlying owners before the transaction took effect, thereby allowing new owners to be introduced at that point if desired (eg new family members);

- there is no requirement to provide consideration for the transferred assets, nor any restrictions imposed on the form that consideration can take (compare this with Subdiv 122-A which is available only if any consideration provided takes the form of shares in the transferee company). As discussed below, the ability to “sell” the assets for full value as part of the restructure has several advantages; and
- a choice to use the concessions in Div 152 can be made on an asset by asset basis, and in fact can be made for only part of a gain (for instance, an entity with CGT concession stakeholders both over 55 and under 55 would have the option to apply the retirement exemption to only part of a gain, for the benefit of the over 55s, and the small business replacement asset roll-over to the remainder of the gain to possibly buy enough time to later apply the retirement exemption in favour of the under 55s without the requirement to contribute to superannuation). Compare this with Subdiv 124-N for example (disposal of assets by a trust to a company) which requires *all* CGT assets to be disposed of to the transferee company.

### Motivation for transaction is irrelevant (other than for Pt IVA purposes)

In the context of restructuring small businesses, the most often considered alternative to the small business CGT concessions is the small business restructure roll-over in Subdiv 328-G. One of the most significant differences between the two is that the small business restructure roll-over can be accessed only in the case of a “genuine restructure”, or by satisfying a safe harbour which imposes restrictions on the ongoing business for three years following the restructure. It is beyond the scope of this article to discuss the meaning of “genuine restructure” but suffice to say the small business concessions in Div 152 have no such purpose-based requirement.

## Reasons against using the small business CGT concessions to restructure a business

### Loss of pre-CGT status

A corollary of the small business CGT concessions not being a roll-over, and therefore providing a permanent tax saving via an uplift in cost base, is that any favourable tax attributes of the transferred assets will similarly be lost, most importantly, any pre-CGT status. It follows that using the small business CGT concessions to change the ownership of a pre-CGT asset will have the effect of bringing that asset into the CGT net for a subsequent business or asset sale (or other CGT event). That would not be the case if a roll-over were used.

### No shelter for balancing adjustment amounts

Many of the “standard” roll-overs that lend themselves to business restructures (individual, trustee or partnership to a company (Subdivs 122-A and 122-B); unit trust to a

company (Subdiv 124-N); and the small business restructure roll-over (Subdiv 328-G)) bring with them balancing adjustment roll-over relief for the transfer of depreciating assets (s 40-340 ITAA97). This is to be contrasted with the small business CGT concessions which, if available, will disregard capital gains only. Assessable balancing adjustment amounts on the transfer of depreciating assets will remain.

### Trading stock

The transfer of trading stock as part of a business restructure will be treated as a disposal of trading stock outside the ordinary course of business such that the assessable income of the transferor includes the market value of the stock on the date of the transfer (s 70-90). The small business CGT concessions do not provide any relief from this provision.

This outcome may be able to be addressed in a number of ways:

- arguing that the market value of the stock in the context of a business transfer is the wholesale price and therefore not much different to book value;
- if circumstances allow, “run down” the stock levels leading up to the restructure;
- avail oneself of the election available in s 70-100 ITAA97 to treat the stock as disposed of at closing value via a “double shuffle”; or
- decline to transfer the trading stock, but rather have the company sell it on consignment for the trust.

### Requirement to make a superannuation contribution if using the retirement exemption

As discussed in more detail below, if the retirement exemption is used to disregard a capital gain otherwise generated by a business restructure, and the relevant CGT concession stakeholders are under 55 years of age, a contribution must be made to superannuation equal to the exempt amount. Depending on their broader life circumstances and objectives, being subject to the preservation rules that apply to superannuation may not be attractive to the business owners.

### To sell or not to sell?

One of the key advantages of choosing to apply the small business CGT concessions to a business restructure is that Div 152 does not speak to the “other side” of the transaction. That is to say, there are no requirements in terms of whether consideration must be provided or, more importantly, if it is, what form that consideration must take. The roll-overs in Div 122 (roll-over for the disposal of assets to, or the creation of assets in, a wholly owned company) are a case in point. For roll-over relief to be available under that Division, any consideration received by the taxpayer for the CGT event happening must be only non-redeemable shares in the company and the company undertaking to discharge one or more liabilities in respect of the asset or assets of the business (eg s 122-20 ITAA97).

Where structuring “out of” a trust or partnership, this fact opens up an opportunity to “sell” assets for their full market value in return for a vendor loan, whereby periodic repayments can be made from the transferee’s after-tax profits and be “drawn down” from the trust without top-up tax being payable.

Care should be taken, however, where the retirement exemption is being applied to exempt the relevant capital gain, in which case, payments of the exempt amount must be made to CGT concession stakeholders lest the requirements for the exemption not be satisfied. Careful thought will need to be given to the timing requirements for such payments and whether s 152-325(2) ITAA97 (which contemplates capital proceeds being received in instalments) operates to allow them to be made in line with the timing of the receipt of loan repayments.

Another reason to transfer assets at full market value when using the small business CGT concessions arises where the transferor has made a family trust or interposed entity election (IEE) and assets are being transferred to an entity outside the family group. Where that is the case, a failure to do so for less than market value may trigger family trust distribution tax (FTDT). Also note that a distribution includes a payment by way of loan for these purposes (s 272-60(1)(a) of Sch 2F to the *Income Tax Assessment Act 1936* (Cth) (ITAA36)) – this should be kept in mind where consideration is payable on vendor terms as discussed above.

## Applying the 15-year exemption to a business restructure

The 15-year exemption provides for a full exemption of a capital gain where a taxpayer has owned the CGT asset for at least 15 years.

An individual is entitled to a full exemption if (s 152-105 ITAA97):

- the *basic conditions* are satisfied;
- the asset has been owned continuously for over 15 years;
- if the CGT asset is a share in a company or an interest in a trust, the company or trust must have had a *significant individual* for a total of 15 years during which it owned the CGT asset; and
- the taxpayer is at least 55 years of age and the CGT event happens in connection with the retirement of the taxpayer, or the taxpayer is permanently incapacitated at the time of the event.

A company or trust is entitled to a full exemption if (s 152-110 ITAA97):

- the *basic conditions* are satisfied;
- the asset has been held continuously for over 15 years;
- the taxpayer had a *significant individual* for a total of 15 years during the period of ownership; and
- a *significant individual* just before the CGT event is at least 55 years of age and the CGT event happens in connection with the retirement of that individual, or the

individual is permanently incapacitated at the time of the event.

## In connection with retirement

As noted above, in order to get access to the 15-year exemption, the taxpayer, or in the case of a company or trust taxpayer, a significant individual in the company or trust just before the CGT event, must be at least 55 years of age and the CGT event must happen in connection with their retirement, or they are permanently incapacitated (s 152-110(1)(d)).

The phrase “in connection with retirement” is not defined in the legislation. It therefore takes on its ordinary meaning.

There are two components of this requirement that must be satisfied in order for a taxpayer to get access to the 15-year exemption:

- the relevant over 55 individual must be “retiring”; and
- the CGT event must be “in connection with” that retirement.

## Retirement

Comments made by the Commissioner in the *Advanced guide to capital gains tax concessions for small business 2013-14* (NAT 3359) make it clear that it is not necessary for there to be a permanent and everlasting retirement from the workforce, and that a significant reduction in the number of hours that the individual works or a significant change in the nature of their present activities may be sufficient to constitute retirement.

## “In connection with”

There is a helpful summary in PBR 1052118885373 of how the courts have interpreted the phrase “in connection with”, making it clear that it can include CGT events that happen before or after the retirement, as long as they are related to the retirement, or “have to do” with the retirement. In PBR 1052110338557, it is stated that “[t]he phrase ‘in connection with retirement’ infers that the capital gain arising from the disposal of active assets is to be used to provide funds for a person’s retirement rather than to precipitate retirement at the time of the CGT event. The words used in the EM support this interpretation” (emphasis added).

Also noteworthy is an example in the *Advanced guide to capital gains tax concessions for small business* in which it is stated that “if it can be shown that the reason for the disposal of the assets is connected to retirement and the later sale is integral to the small business operator’s retirement plan, the sale may be accepted as happening in connection with retirement”.

## Can a CGT event brought about by a restructure be “in connection with retirement”?

Where the CGT event for which the 15-year exemption is being sought is part of the restructure of an ongoing business, it may be practically harder, although not

impossible, to establish that it is in connection with the retirement of an over 55 significant individual. PBR 1052110338557 (extracted below) is a case in point.

#### PBR 1052110338557

##### Facts (in so far as they are relevant)

A company intends to dispose of property to a related trust (the Property Trust).

“17. The disposal of the Property will be at market value.

18. The market valuations will be prepared by a qualified valuer.

19. The Company will provide the proceeds from the disposal of the Property to Individual A.”

Individual A is employed in the business of another trust in the group (the Family Trust). They are over 55 and looking to retire.

##### Detailed reasoning on the “in connection with retirement” requirement for the 15-year exemption

“17. The provisions relating to the small business 15-year exemption do not define what is meant by the phrase ‘in connection with a taxpayer’s retirement’, nor does it give any indication of the degree of retirement required in order to take advantage of this concession. Accordingly, whether a CGT event happens in connection with an individual’s retirement depends on the particular circumstances of each case.

18. Following the disposals of the Property, the capital proceeds will flow through to Individual A and will provide funding for their retirement.

19. Additionally, there will be a significant reduction in the number of hours worked by Individual A. After the disposal of the Property, Individual A’s involvement in the Family Trust’s activities will cease. The business activities that Individual A currently undertakes will be conducted by Child One.

20. The Commissioner considers there is a clear link between the disposal of the Property and Individual A’s retirement. It is considered that the disposal of the Property is integral to their retirement plans.

21. Paragraph 152-110(1)(d) is satisfied.”

However, in more recent private binding rulings, the Commissioner has placed more emphasis on whether proceeds from the relevant CGT event have been used to fund the relevant individual’s retirement. For example, in PBR 1052294374162, the Commissioner says:

“... the funds arising from the disposal of the asset must predominantly be intended to fund the retirement of the individual (whether or not supplemented by other monies).

... where the funds are intended to be employed in a manner other than funding the individual’s retirement (for example the acquisition of a new business that the individual will have an active role in, or the gifting

of the monies, or the investment of the monies within the trust for the benefit of family members generally at the Trustee’s discretion) then the test will not be satisfied.”

If this is the correct interpretation one wonders if the transfer of assets for no consideration pursuant to a restructure can ever satisfy the ‘in connection with retirement’ condition given there will be no funds to apply towards one’s retirement.

### The 15-year exemption and the two-year rule

If a capital gain made by a company or trust is disregarded under the 15-year exemption, any payment (in relation to the exempt amount) that the company or trust makes to a CGT concession stakeholder is disregarded when determining the taxable income of the company or trust, the individual and/or any interposed entities, provided the payment is made within two years of the CGT event (s 152-125 ITAA97). Additionally, if a company makes such a payment, the payment is not taken to be either a dividend or a frankable distribution (s 152-125(3)). Importantly, the amount of the payment which can be disregarded is limited to the stakeholder’s percentage interest in the company or trust (s 152-125(2)).

It follows that there is a built-in mechanism within the 15-year exemption to enable owners to extract the benefit of applying the exemption within a company without having to liquidate (in contrast to the Div 152-C small business 50% reduction). That is, any payment in relation to the exempt amount made to a CGT concession stakeholder, within two years of the CGT event, is disregarded for income tax purposes.

The challenge when it comes to a gain generated by a business restructure is whether there are sufficient funds in the taxpayer entity to make the “payment” required to take advantage of this two-year rule. Where the CGT concession stakeholder has a debit loan with the company, query whether the doctrine of set-off referred to by the High Court in the case of *FCT v Steeves Agnew & Co (Vic) Pty Ltd*<sup>1</sup> can be applied to treat an amount offset against the stakeholder’s debit loan as being a “payment” for the purposes of s 152-125, or whether the ATO would insist on a physical payment being made to the shareholder followed by the shareholder paying that amount back to the company in satisfaction of its debit loan. Some light is thrown on the Commissioner’s view of the doctrine of set-off in GSTD 2004/4.

### Taking advantage of the CGT cap

An additional benefit of applying the 15-year exemption is that an amount equal to the capital proceeds from the CGT event can be contributed to superannuation for the benefit of the taxpayer, or CGT concession stakeholder(s) in the taxpayer, using the CGT cap (s 292-100).

Where the higher CGT cap (\$1.78 million for the 2024–25 income year) is on the table because a non-individual taxpayer has claimed the 15-year exemption, the relevant

contribution must nonetheless be made by the *CGT concession stakeholder* (s 292-100(1)). Also required is that the entity claiming the exemption must have made a *payment* to the CGT concession stakeholder within two years of the CGT event (s 292-100(4)(b)(i)), and the contribution cannot exceed this payment (s 292-100(4)(c)). It follows that the transferor company or trust will have to go through the process of making a payment to the CGT concession stakeholder of the amount to be contributed to superannuation, even if it has not received actual capital proceeds for assets transferred as part of the restructure.

## Applying the retirement exemption to a business restructure

The retirement exemption may be used to disregard a capital gain to the extent that the taxpayer's CGT concession stakeholder(s) lifetime *CGT retirement exemption limit* of \$500,000 is not exceeded (ss 152-310 and s 152-320 ITAA97). The CGT concession stakeholders of the taxpayer will be required to contribute the exempt amount into a complying superannuation fund or a retirement savings account if they are under 55 at the relevant time (s 152-325(7)).

To qualify for the retirement exemption, a company or trust must satisfy the following conditions (in addition to the conditions applying to all taxpayers):

- it must have at least one significant individual just before the CGT event (s 152-305(2)(b) ITAA97);
- it must make a choice in writing<sup>2</sup> to apply the exemption and, where there is more than one CGT concession stakeholder, specify each stakeholder's percentage of the exempt amount (s 152-315(5) ITAA97). There is no requirement for each CGT concession stakeholder's percentage of the CGT exempt amount to correspond to their small business participation percentage in the taxpayer;
- if the company receives capital proceeds from the event,<sup>3</sup> it must make a payment equal to the lesser of the exempt amount and the capital proceeds from the event to at least one CGT concession stakeholder (s 152-325(1)). If the payment is made to more than one stakeholder, the payment must be made in accordance with each stakeholder's percentage of the exempt amount (s 152-325(3)). Payments must be made by the later of seven days after the company chooses to disregard the capital gain and seven days after it receives capital proceeds for the CGT event (s 152-325(4)); and
- if the CGT concession stakeholder is under 55 just before receiving a payment, the taxpayer must make the payment to a complying superannuation fund or a retirement savings account on behalf of the CGT concession stakeholders (s 152-325(7)). For superannuation income tax purposes, this will be treated as a personal contribution made by the CGT concession stakeholder (s 152-325(8)). Such contribution is not deductible to the stakeholder (s 290-150(4)(b) ITAA97).

Of particular interest in the context of seeking to apply the retirement exemption to the restructure of an ongoing business is the requirement that, if the transferor entity receives capital proceeds for the event (keeping in mind that, if there are no actual proceeds received, or if the parties do not deal with each other at arm's length and the proceeds received are more or less than market value, market value proceeds will be deemed under s 116-30 ITAA97), it must make a payment to at least one of the CGT concession stakeholders (or if they are under 55, to their superannuation fund).

The amount of the payment required to be made by a taxpayer to CGT concession stakeholders in order to get access to the retirement exemption is the lesser of (s 152-325(5)):

- the capital proceeds *received* (or where the retirement exemption is being applied to a gain earlier deferred by the small business roll-over and now being reinstated by CGT event J2, J5 or J6 – the amount of the reinstated gain); and
- the relevant CGT exempt amount (which obviously cannot be greater than the \$500,000 lifetime CGT retirement exemption limits of CGT concession stakeholders in the taxpayer).

**“For eligible taxpayers, the small business concessions ... are an alternative to using one of the ‘traditional’ roll-overs.”**

The taxpayer must make payments, or superannuation contributions where the CGT concession stakeholder is under 55, equal to the CGT exempt amount by the later of (s 152-325(4)):

- seven days after the company or trust makes the choice to apply the exemption (generally when the tax return for the year in which the CGT event took place is lodged); and
- seven days after the company or trust receives an amount of capital proceeds from the CGT event.

The important point to note is that a company or trust *must* make the relevant payments in accordance with the rules in Subdiv 152-D regarding amount, timing and recipient (ie to the CGT concession stakeholder or their superannuation fund, depending on their age) in order to be eligible for the retirement exemption. A failure to do so will mean that the retirement exemption is not available and the corresponding capital gain will be taxable.

Where capital proceeds are non-monetary or payable on vendor terms, for example, not unlikely in a restructure context, it may be necessary to source the funds required to make the retirement exemption payment from elsewhere.

If the taxpayer does not have sufficient liquidity to make this payment out of its own assets, it may be necessary to borrow (almost certainly on a non-deductible basis).

## Market value

If the transaction to which the small business CGT concessions are being applied is between related parties, one might wonder whether it is necessary to get a market valuation of the relevant assets and, if so, how “robust” that valuation needs to be.

Notwithstanding the fact that a transaction being effected for business restructuring purposes is between related parties, an understanding of the market value of the assets concerned may be required for one or more of the following reasons:

- to ascertain whether the taxpayer passes the \$6 million maximum net asset value test just before the CGT event;
- if a family trust or IEE is in place and assets are being transferred to an entity outside the family group, that sufficient consideration is provided by the transferee;
- if it is intended that trust unpaid present entitlements owing to the transferee entity will be satisfied by the transferred asset;
- if the retirement exemption is being applied, to work out the amount of payments that need to be made to, or on behalf of, CGT concession stakeholders;
- if relevant, to ensure that the two-year rule for liberating the 15-year exemption amount from a company or trust tax-free is applied properly;
- to determine the cost base of the asset for the transferee entity; and
- where depreciating assets and/or trading stock that are not covered by the small business CGT concessions are involved in the restructure.

The ATO’s guide *Market valuation for tax purposes* contains information on what market value means for tax purposes and the evidence and processes that the ATO generally expects to see to support a valuation.

## Preserving future access to the concessions

Depending on the circumstances of the particular business, it may be anticipated (hoped) that the small business CGT concessions can be applied to a later transaction involving business assets, perhaps by then a sale to an unrelated purchaser. Where that is the case, it would be prudent to look ahead to the target structure to make sure that the concessions remain available for the later transaction (as far as is possible, given the possibility of legislative change always exists).

Particular dangers that lie waiting for the unwary when “designing” the target structure so as to ensure that the concessions can be applied again to a later transaction include:

- if restructuring to separate valuable assets from trading activities for asset protection purposes, ensuring that the “new” asset holding entity remains connected with the trading entity to enable the active asset test to be passed for a subsequent sale (see the example below);
- the additional conditions in s 152-10(2) that apply when the CGT asset involved is a share in a company or unit in a unit trust; and
- the difficulty that different share or unit classes can bring when looking to identify a significant individual in a company or unit trust (see TD 2006/77 for more information).

### Example. Restructuring for asset protection – preserving access to the concessions

XYZ Unit Trust carries on a manufacturing business, managed and controlled by four brothers. All of the units in the trust are owned in equal proportions by four discretionary trusts, each of which is controlled by one of the brothers. XYZ Unit Trust also owns the factory in which the manufacturing activity takes place. The brothers have recognised that the factory is at risk should there be any legal action taken against the trust’s business activities.

The brothers decide to transfer the factory to a new company, ABC Pty Ltd. The shares in the company are to be owned in the same way that units in XYZ Unit Trust are owned, that is, in equal proportions by the same four discretionary trusts, each controlled by one of the four brothers. XYZ Unit Trust applies the small business retirement exemption to this transaction. This allows the trust to make superannuation contributions on behalf of the brothers without impacting their non-concessional contributions cap, and also results in the company having a cost base in the factory equal to its value at the time of the transfer.

Some years later, the brothers are made an offer that they can’t refuse to sell the factory. ABC Pty Ltd satisfies the \$6 million maximum net asset value test, and because the factory has at all times been used in the business of XYZ Unit Trust (which the brothers own in the same capacity), it is assumed the small business concessions can be used to reduce the gain, which can then be passed out in a tax-effective manner via winding up the company and making a liquidator’s distribution.

The bad news for the brothers is that, in order for ABC Pty Ltd to apply the small business 50% reduction to the factory, it must satisfy the active asset test. In practical terms, this requires ABC Pty Ltd and XYZ Unit Trust to have been connected entities (or the trust to be an affiliate of the company) for at least half the period of time the company has owned the factory (up to a maximum of 7.5 years). The definition of “affiliate” in s 328-130 ITAA97 does not include trusts, so the only way the active asset test can be passed is if XYZ Unit Trust and ABC Pty Ltd have been connected entities at all relevant times.

**Example (cont)**

Given neither entity controls the other, they can be connected only if the same third entity controls them both. The difficulty is that there is no direct controller of ABC Pty Ltd nor of XYZ Unit Trust (none of the discretionary trust shareholders owns at least 40% of the shares or units), and therefore no third entity that can be said to control both the company and the trust. Furthermore, as trusts cannot be affiliates, there is no way to aggregate the shareholdings of two or more trusts to establish the 40% minimum required for control.

Sadly, this means the factory does not have the history of being used in the business of a connected entity that is required to pass the active test, and the small business CGT concessions are therefore not available to the company on subsequent sale of the factory.

Warning: if the unit trust chooses to apply the small business 50% reduction before applying the retirement exemption, payment of that non-assessable amount to unitholders will have CGT consequences at the unitholder level under CGT event E4.

**Conclusion**

It can be seen from the above discussion that the small business CGT concessions, if available, are a legitimate and sometimes preferable way to undertake a tax-effective business restructure. However, there may be traps along the way that advisers should be aware of.

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This article is an edited version of "Using the small business CGT concessions to restructure a small business" presented at The Tax Institute's VIC Tax Forum held in Melbourne on 20 to 21 March 2025.

**References**

- [1951] HCA 26.
- A choice to use the retirement exemption must be documented in writing independent of, and in addition to, the way in which the return is prepared (s 103-25(3)(b) ITAA97). This is an exception to the general rule that the way the taxpayer prepares their return is sufficient evidence of making a choice.
- An exception to this requirement is where the capital gain to be exempted arises from CGT event J2, J5 or J6. Where that is the case, a payment must be made notwithstanding that \$nil capital proceeds have been received (s 152-325(1)(a)).





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# Holistic tax and estate planning: a guide for 2026

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The intergenerational wealth transfer in Australia, fuelled by the disproportionate quantum of community capital controlled by “baby boomers”, makes holistic tax and estate planning a compulsory discipline for most advisers. To facilitate holistic tax and estate planning solutions, advisers must develop heuristics that proactively identify upper order revenue-related consequences. Additionally, an embracing of the estate planner’s “Pareto principle” – that is, understanding that often less than 20% of someone’s wealth is regulated by their will – is near compulsory. As the new calendar year approaches, it is timely to again explore key strategies utilised in the holistic tax and estate planning arena over the last 12 months, and to identify risks that all advisers should be aware of.

## Introduction

Considering ongoing changes to the taxation regime and the expanding wealth of Australia’s ageing baby boomer population, there has for many years been a growing need for holistic estate planning to consider appropriate tax and revenue-related structuring.

Around this time last year, an article in this journal<sup>1</sup> explored several key tax and estate planning-related changes, including:

- (unnecessarily) complex testamentary trusts;
- gift and loan back strategies;
- estate equalisation and “hotchpot” arrangements; and
- superannuation and binding death benefit nominations (BDBNs).

Twelve months on, this article examines the following tax structuring and holistic estate planning-related developments sourced from 2025 (with a particular focus on trust-related issues, and highlighting some important hazards that advisers should actively seek to avoid) as the foundation for the year ahead in 2026, namely:

- trust-to-trust distributions;
- avoiding a trust vesting (for tax reasons);

- failed trust distributions; and
- joint tenancy asset ownership.

## Trust-to-trust distributions

Generally, when trust-to-trust distributions are made, the vesting date of both trusts should be considered. Where the recipient has a vesting date which is later than the distributing trust, the risk that the rule against perpetuities is breached is a relevant issue.

Generally, the case of *Nemesis Australia Pty Ltd v FCT*<sup>2</sup> is cited as confirmation that the “wait and see” rule<sup>3</sup> can be relied on in a situation where a trust distributes to another trust with a later perpetuity date, provided the original trust was established after the enabling legislation in the relevant jurisdiction was passed.

This nuance means (perhaps counterintuitively) that older deeds may not be able to rely on the wait and see rule, as confirmed in the decision of *Domazet v Jure Investments Pty Ltd*.<sup>4</sup> In this case, the court observed that the wait and see concession (and other advantages created by the parliament) only applied to trusts established after the commencement date of the legislation.

The rule against perpetuities is generally accepted to have been first developed in the *Duke of Norfolk’s case*,<sup>5</sup> with the key driver arguably being a desire to ensure the free alienability of land holdings.

The rule against perpetuities is said to perform a “useful social function” by limiting the power of members of generations past from tying up property in such a form as to prevent it from being freely disposed of in the present or the future (that is, avoiding “control by dead hands”).

A further related argument is that the rule against perpetuities helps to avoid an undue concentration of wealth in the hands of a few by forcing transfers out of historical trust structures (often inevitably leading to payment of, sometimes material, government transaction costs (eg tax and stamp duty) and the division of wealth across multiple beneficiaries).

Certainly, in modern Australia, the revenue costs triggered by trust vesting and the inability to transfer the assets of a trust directly to another trust in a manner that exceeds the perpetuity period of the originating trust occupy an ever-increasing amount of adviser attention, as highlighted by the analysis later in this article (in relation to the attempts to avoid premature trust vesting).

As set out in *Air Jamaica Ltd v Charlton*:<sup>6</sup>

“29. ... no interest is valid unless it must vest, if it vest at all, within a period of a life in being the date of the gift plus 21 years. The Rule is applied remorselessly. A gift is defeated if by any possibility, however remote, it may vest outside the perpetuity period. It is not saved by the fact that, in the event, it vests inside the period ...

30. The Rule against Perpetuities also applies to the administrative trusts and powers of the trustees. Such powers must not be capable of being exercised outside

the perpetuity period, and they may be void even if all the trusts to which they are attached are valid. Where, therefore, there is a trust for A for life with remainder to his widow for life, and the trustees are given a power to sell or lease land comprised in the settlement, the power is void ab initio because it is capable of being exercised at any time during the widow's life, and she may survive A by more than 21 years ...”

The wait and see rule is designed to enable a court to look at what actually occurs before the expiry of the perpetuity period, and the circumstances as they have unfolded, in order to determine whether there has been a vesting within the perpetuity period. If, in fact, the interest is vested prior to the expiry of the perpetuity period, notwithstanding that a longer period is provided for in the trust deed, the trust may be valid. The trust would then not infringe the rule against perpetuities.

The legislative-crafted wait and see rule was introduced to remedy what was seen as a deficiency in the common law rule, namely, that the common law was concerned with possible or hypothetical, and not actual, events. That is, at common law, where a disposition might be void on the basis that it might not become vested until too remote a time, it would be void at the moment of the initial distribution.

## “... the trustee of the distributing trust must ensure that the approach is in fact permissible ...”

The legislative version of the wait and see rule means, however, that the disposition must be treated as valid until such time as it is actually established that the vesting will in fact occur after the end of the perpetuity period. That is, the wait and see rule means the initial distribution will not be void when made, and will not become void until such time as there is a failure to distribute out of the recipient trust before the vesting date of the original distributing trust.

Importantly, however, the ability to rely on the wait and see rule is also subject to the often referenced mantra “read the deed”. That is, the trustee of the distributing trust must ensure that the approach is in fact permissible in accordance with the terms of the trust instrument.

That said, another common strategy to manage the issues in this area is for the original trust to distribute to a corporate beneficiary (owned by the second trust), rather than distributing directly to the second trust. This approach ensures that the rule against perpetuities is not triggered, as the distribution results in an immediate vesting of the distributed amount (in the company). In essence, the 80-year perpetuity period (or longer, if the shareholding trust of the recipient company is a South Australian trust<sup>7</sup> or a Queensland trust<sup>8</sup>) starts again as at the date of the distribution.

This can be contrasted with a distribution made to another trust, where the amount does not vest in any ultimate beneficial owner until a further distribution is made by the second trust.

## Avoiding a trust vesting (for tax reasons)

Many recent cases have explored various aspects of the ability of trustees of trusts, with vesting dates earlier than the perpetuity period available by law, to apply to a court for an extension. For example, in *Re Gengoult-Smith Family Trust*,<sup>9</sup> an impending (in less than 10 days) vesting was accepted by the court as likely to incur a CGT liability of up to \$10 million.

The relevant trust deed had a variation clause that did not extend to the clauses setting out the perpetuity period. In granting an extension of the vesting date from the original 50 years to 80 years, the court confirmed that the fact that there were infant and unborn children helped support the application because there would then be a longer period of time by which those people could become a beneficiary.

The court held that the purpose of the trust, the settlor's intention and the attitude of other beneficiaries led inexorably to the conclusion that the proposed extension of the vesting date was a proper and fair one.

The trust deed recorded the settlor's intention “to make provision herein for the children of” certain named beneficiaries, whose interests would have been detrimentally affected by the extension.

Critically, and decisively, those adversely affected beneficiaries had each consented to the proposed arrangement.

Thus, the deferral of those revenue-related implications was held to be of clear benefit to both the present and potential future beneficiaries of the trust, as well as fair and proper overall.

Arguably, the starkest example of the need for trust advisers to embrace the foundational heuristic (ie read the deed) is where a trust instrument contains no, or an inadequate, power to vary. The issues in this regard are particularly stark as the trustee of a discretionary trust cannot amend or vary a trust deed, unless expressly permitted by the terms of the deed (or legislation).<sup>10</sup>

Helpfully, there have been numerous cases in recent years confirming the framework for what is often the only potential remedy, that is, a court application.

Unhelpfully, not only does the solution require court approval (with all of the second order consequences, including costs, time investment and publicity – see, as one high-profile example, the 2024 case instigated by Rupert Murdoch<sup>11</sup>), there is also the threshold holistic estate planning heuristic that the answer as to whether any application will be successful is, “it depends”. For example, in *Re Evangelista Family Trust*,<sup>12</sup> the relevant trust deed was established in 1975, and had a 50-year vesting date. While the deed granted the trustee an unfettered discretion to

vary the trusts, that power was subject to the restriction, “except to the extent of the vesting date”.

The parties had confirmed that an immediate vesting would trigger very substantial CGT and duty implications.

The court, in granting the extension, confirmed that it was a well-established proposition that an extension may have the potential effect of deferring revenue consequences to a later date. The court noted that such deferral does not ultimately deprive proper authorities of revenue; rather, it merely defers the costs to another date, subject to the laws that exist at the time.<sup>13</sup>

Interestingly, the court specifically acknowledged the (at the time) proposed amendments to the *Property Law Act 1974* (Qld). These changes were not due to commence until after the existing vesting date of the trust, but otherwise, only a few months after the application, would have permitted as extension of the perpetuity period to 125 years. This point was held to be a relevant consideration only to the extent that it provided the court with some comfort that there was nothing unusual about it granting the perpetuity date of 80 years in this case.

The decision in *Re EM McPherson Settlement*<sup>14</sup> provides further lessons in all of the key areas.

In relation to a trust deed from 1972, the application involved four key requests, as set out below, including a brief summary of the approach adopted by the court:

1. **an extension of the vesting date:** the court approved the extension of the vesting date to 80 years from the date of the original deed. This decision was based on the benefits of allowing more time for potential beneficiaries to be born and benefit from the trust, as well as deferring CGT liabilities;
2. **broadening the range of potential beneficiaries:** the court approved the amendment to include companies and trusts in which beneficiaries had an interest, subject to certain qualifications;
3. **managing various other tax issues:** in addition to flagging the deferral of CGT by granting an extension to the perpetuity period, the court endorsed changes that would allow distributions to entities with tax losses, the creation of sub-trusts (designed to avoid adverse tax consequences under Div 7A of the *Income Tax Assessment Act 1936* (Cth), which can deem unpaid distributions to corporate beneficiaries to be dividends), general income streaming powers, and give the trustee power to choose the method for determining the “net income” and the “income” of the trust (ie to address the impact following the decision in *Federal FCT v Bamford*<sup>15</sup>); and
4. **a general power of amendment:** the court rejected the request for introducing a general power of amendment, primarily as it was unable to be satisfied that all future amendments would in fact benefit minor and unborn beneficiaries (a key mischief that the court needs to be satisfied about before granting any variation, and thus in turn effectively mandating that any future desired

changes to the trust deed will require further court applications).

In a comprehensive decision that numbers over 215 paragraphs, a summary of some of the other noteworthy elements that advisers should be aware of include each of the points set out below.

The trust, with assets at the date of the hearing in excess of \$20 million (which included shares owned in a family investment company which, at the date of the application, was not in fact a beneficiary of the trust), would have vested by 30 June 2030, but for the successful application.

Given the revenue-driven nature of a number of the proposed changes, notice of the court application was issued to both the Federal Commissioner of Taxation and the Commissioner of State Revenue, with a request that they advise whether they sought to be joined – both Commissioners declined.

However, before granting an extension to the vesting date of a trust, the court must be confident that it is appropriate, having regard to whether it is for the benefit of the beneficiaries, and fair and proper, and what form the amendment providing for the extension should take – the issues in addressing these two factors can be complex, and certainly were in this case (occupying some 60 paragraphs of the judgment).

The mere fact that extending a vesting date has a purpose of obtaining a tax advantage should not see the court decline to exercise its power, if it is otherwise appropriate to do so.<sup>16</sup>

Similarly, broadening the class of potential beneficiaries can be justified by reasons such as using a corporate beneficiary (or a “bucket company”) to cap tax at the company tax rate, distributing to related trusts with carry forward income tax losses, and minimising the accumulation of assets in personal names which would be available for division among creditors, in the event of bankruptcy.

Before extending the class of potential beneficiaries, however, the court needs to consider the intention of the settlor<sup>17</sup> and whether adding beneficiaries destroys the substratum of the trust or would constitute a resettlement.<sup>18</sup>

Ultimately, it is likely that a court can approve arrangements which have no identified purpose other than for tax-related objectives, assuming it is satisfied that the arrangement is for the benefit of all beneficiaries, including those who cannot consent<sup>19</sup> (that is, “the court is not a watch-dog for the Inland Revenue”<sup>20</sup>), particularly where the revenue authorities are informed of the application and choose not to intervene (as was the case here).

Furthermore, the financial advantage to certain beneficiaries from a more tax-effective allocation of trust income was held to also flow, to some degree, to the broader family, at least indirectly. While the extent to which that would occur was uncertain, it was still appropriately regarded as a “benefit” to all relevant beneficiaries, although this conclusion was subject to altering the initially proposed definition of “beneficiaries” to require a closer

relationship between the family member beneficiaries and the corporate beneficiaries.

That is, instead of a definition of “any company in which any beneficiary has any interest”, an alternative definition of “beneficiary” was appropriate, relevantly, “private companies in which a beneficiary has a controlling interest”.

Finally, at least in Victoria (and jurisdictions with similarly drafted enabling legislation, where the court must be satisfied that granting a general power of variation will for evermore be for the benefit of the beneficiaries who are unable to consent for themselves), it is very difficult to reach that state of satisfaction “when the court does not have the detail of all the variations that the trustee will make, once given the general power of variation”.<sup>21</sup>

## Failed trust distributions

The decision in the case of *Benaroon Pty Ltd v Larmar*<sup>22</sup> provides one of the leading examples of the issues that can arise from a failure to embrace what should arguably be the mantra of every trust adviser – and mentioned twice already in this article, that is, to “read the deed”.

Here, in summary:

- the (assumed) “standard” discretionary trust deed was created in 1977;
- for over 40 years, distributions had been made to Mr Larmar (the person responsible for requesting that the trust be established<sup>23</sup>) and his wife at the time of establishment of the trust and a subsequent wife (following divorce from the first wife);
- the trust deed, however, did not include in the range of potential beneficiaries Mr Larmar, nor either wife;
- it was accepted that, in the absence of rectification of the trust deed to add Mr Larmar as a beneficiary, any distribution to him (and his former wife and current wife) will have been made without authority; and
- the requested rectification was opposed by Mr Larmar’s current wife (Margaret Larmar), in relation to whom the ATO took the view, after an audit, that she would be entitled to a tax refund if not a beneficiary of the trust, but would have a tax liability of nearly \$8 million if she was a beneficiary.

In denying the rectification application, the court confirmed the following key points.

As was confirmed in the case of *Public Trustee v Smith*,<sup>24</sup> the key test for rectification, is that:

“... there must be *clear and convincing evidence* that at the time the trust deed was executed the trustee and the settlor had an actual intention as to the effect which the deed was intended to create which was different from the effect which the instrument did have in a clearly identified way. It must be *demonstrated with clarity* that the parties had a *sufficiently precise intention* that the court can determine both the substance and the detail of the precise variation to be made to the wording of the instrument.”

Here, the available evidence was uncertain in many respects and could not be described as either clear or convincing.

The evidence submitted by the trustee to the court about trust distributions that were made to Mr and Mrs Larmar (in breach of the terms of the trust deed) did not help to provide clear and convincing proof of the form which the trust deed was intended to take – indeed, these distributions only added to uncertainty about what the original intentions were.

Ultimately, the function of a court rectification is to reform a trust instrument so that it accords with the relevant intention, not to redraft it into a form that it might have taken had the parties thought more about it at the time it was executed.

While it was not expressly stated, and admittedly a rather obvious observation with hindsight, the question must also be asked: why were distributions being made for around 40 years, apparently without any reference to the definition of beneficiaries under the trust instrument?

As a further point of reference, the decision in *Doma ACT Pty Ltd v LN Sydney Pty Ltd*<sup>25</sup> is instructive. The case involved entities controlled by the Domazet family (a group featured earlier in this article, in relation to trust-to-trust distributions).

The document in question was a June 30 trust distribution resolution that, on its face, distributed \$10 million to another trust (which would have caused tax at the top marginal rate), as opposed to a corporate beneficiary (or bucket company) that would have limited the tax to the corporate rate.

The court accepted that the error appeared to have occurred due to data entry limitations in computer technology which confined the number of characters for company names, although the physical funds were distributed to who the parties argued was the intended recipient.

The ATO was given the chance to appear before the court and confirmed that it would give effect to any orders the court made.

The court, on drawing together the subjective intentions (or the states of mind) of the directors, the advice given by the internal accountants, the explanation given by the external accountant and adviser, and the contemporaneous business records setting out what was to occur and what did occur, allowed the rectification, given its view that there was clear and convincing proof of the intended outcome.

In reaching the above conclusion, the court specifically made the points set out below.

The availability of relief in rectification depends on “disconformity between the form or effect of the document executed and the intention of the parties or party who executed it”.<sup>26</sup>

The simplest kind of case in which rectification is appropriate is where a provision that was intended to be included in a document is inadvertently omitted, where an

unintended provision is included, or where a provision is inadvertently mis-expressed.<sup>27</sup>

The rectified instrument takes effect in its rectified form retrospectively, from the date at which the document was executed (as opposed to the date the order is made),<sup>28</sup> which is significant because of third parties who may be affected by the consequences at a particular point in time (such as the ATO).

The “usual type” of mistake capable of rectification involves incorrectly recording the intention of the maker of a document. Such a mistake may be rectified by inserting words or deleting words, or substituting different words because the words that are there have the wrong meaning.<sup>29</sup>

All of these principles also assume that basic compliance issues have been met, such as ensuring that a distribution resolution is signed and dated by the time required under the trust deed, or by 30 June, whichever is the earlier. The courts have been blunt in their dismissing of attempts to circumvent this requirement, including accepting metadata evidence about the date that a purported resolution was created to prove that it must have been backdated.<sup>30</sup>

The decision in *Re Estate of Stagliano*<sup>31</sup> provides a further stark example across two further key trust distribution compliance-related areas.

The court needed to consider whether an intended “beneficiary” was in fact a valid recipient of an attempted distribution. In particular, in this case, there was an attempted distribution to a deceased estate of a deceased beneficiary.

The trust deed included a beneficiary class as follows:

“75 ... Secondary trust: the trustee or trustees of any trust, whether now existing or hereafter created, (‘the secondary trust’) of which a beneficiary or discretionary object thereunder is a beneficiary of the trust and where the provisions of the secondary trust require a vesting in interest of the trust property prior to the termination date ...”

Interestingly, the decision did not consider whether the recipient “trust” may have been an invalid nomination based simply on the requirement that it have a shorter vesting date – a restriction often not included in specialist trust deeds so as to ensure that the benefits under the wait and see rule can be accessed (as explored earlier in this article).

Instead, the court focused on whether listing “the estate” came within the beneficiary definition under the trust deed.

In concluding that the purported distribution failed, the court made a number of observations, as set out below.

As an initial point, the court confirmed that a deceased estate was not a “trust” within the meaning of the trust deed, nor in any relevant sense under general law.

At a threshold level, the definition of beneficiaries did not include trusts themselves, rather only “the trustee or trustees of any trust” – there was no legal basis on which an estate could be a trustee.

Furthermore, the status of the interests of a deceased person’s property following their death and until completion of the administration of the estate was confirmed in *In the Estate of Constantinou*<sup>32</sup> as follows:

“[33] On death the entire interest in property (legal and beneficial) owned by a deceased person passes to the deceased person’s executor for the purpose of administration under the will. While the estate remains in the course of administration, no person entitled under the will has any proprietary interest in any particular asset.

[34] While an estate remains unadministered, persons entitled under the will have a chose in action to require the deceased’s estate to be duly administered, and that right is disposable and transmissible. It carries with it the right to receive the fruits of the chose in action when they mature. It is recognised by the law that this is an inchoate interest of a kind in the assets of the estate. But that interest can be defeated by the executor using the assets to pay the liabilities of the estate. No doubt, from the time of demise the executor was subject not only to duties as executor but fiduciary duties in respect of the trusts established by the will.

[35] However, it is not until the executor has completed the administration of the estate and assents that property passes to those entitled under the will. Those taking property at that point in time take under the will, not by reason of the assent, but the dispositions of the will become operative because of the assent.

[36] [Where an] estate is still under administration, [and] the executor has not assented ... the executor still holds the entire legal and beneficial interest in all the property and there is no property the subject of the will trusts. There cannot be any extant trusts because, as yet, there is no property held on trust.”

The reference to the “assent” is to the power of the executor or administrator to agree to the vesting in other persons of interests in the deceased’s real and personal property. The effect of an assent is to vest in the person the estate or interest in which the assent relates. Thus, prior to the administration of the deceased estate, there is no specific property capable of constituting the subject property of any trust in favour of a beneficiary.<sup>33</sup>

Certainly prior to probate or letters of administration being granted, the administration of the estate will not have commenced, and even during administration, the estate will still not constitute a trust – here, the resolution was prior to a grant of administration and therefore the attempted distribution failed as the estate did not fall within the beneficiary definition.<sup>34</sup>

The other key issue considered by the court related to the second order consequence of the defect in the resolution of failing to nominate a potential beneficiary. The court noted that, while it was not asked to rule on the issue, the following summarised principles were relevant.<sup>35</sup>

As a threshold issue, it is important to distinguish between those cases where the disposition is plainly beyond power

and those dispositions that are within power, but in respect of which there has been some breach of duty.

An example of the first category (referred to as “excessive execution”) is a purported distribution to an entity that is not a beneficiary under the trust – a fraud on the power, where the power is exercised ostensibly within the terms of the trust but for an improper purpose, is a specific example in this regard.

An example of the second category (referred to as “inadequate deliberation”) is a distribution that is made to a beneficiary within the terms of the trust, but where there has been a failure by the trustee of its duty to give proper consideration to relevant matters or its duty to give real and genuine consideration to the power.

Generally, the offending part of a resolution may be severable, on the basis that it is possible to “distinguish the boundary between the valid and the invalid”, that is, a distinct distribution to a beneficiary may not fail by reason that there is also a purported distribution in excess of power to a non-object.

However, it could also be argued that, where a resolution distributes percentages of the trust income to two intended objects and one distribution fails as being beyond power, it has an effect on the entirety of the resolution.

In the case here, the relevant resolution was prefaced as being “pursuant to the powers vested in the company in the Trust Deed”, but the powers in the deed did not empower the trustee to set aside the income as stated, thus, arguably, it would have been inappropriate to sever parts of the resolution – rather the whole resolution should be held to be ineffective.

Furthermore, even if a part of a resolution is severable, consideration is required as to whether the trustees would not have exercised the power at all, or would have exercised it differently, if they had been properly instructed as to the limits on the power.

Where a resolution as a whole is void (including because it is voidable at the insistence of an aggrieved beneficiary), the result will be that the entirety of the income for the relevant financial year would be dealt with in accordance with a (valid) default distribution clause, or be retained in the trust (and the trustee taxed at the top marginal rate).

## Joint tenancy asset ownership

As is generally well understood by specialist advisers, assets that are owned as a joint tenancy (as opposed to tenants in common) pass automatically to surviving owners on the death of a joint tenant.

However, for CGT purposes, joint tenancy assets are deemed to be owned as tenants in common, in equal shares.<sup>36</sup> This means that the conversion from one ownership mode to the other has no tax consequences. It also means that the death of a joint tenant owner will cause a tax event.

As explored in an earlier article in this journal,<sup>37</sup> critically, from an estate planning perspective, even where title

records indicate that an asset is owned as joint tenants, if it is a partnership asset, it will be deemed to be effectively owned as tenants in common. If this deeming rule applies, the death of a partner essentially causes the value of their interest to pass under their estate plan, and not automatically by survivorship (as is the case generally with assets owned as joint tenants) to the other owners.

Historically, the generally accepted position has been that it is not possible that a chose in action, such as shares, can be held as tenants in common at law.<sup>38</sup>

From an estate planning perspective, this means that many specialist advisers include a provision in wills along the following lines:

“I direct that any gift of shares by this will is to be gifted on the basis that each recipient is to receive a discrete whole number of shares in their sole name (or if the recipient is two or more people, then as joint tenants).”

The decision in *De Lorenzo v De Lorenzo*<sup>39</sup> provides some further insight into the rules in this area. Relevantly, in this case, a will provided as follows:

“5. ... I GIVE AND BEQUEATH to my [three] children ... as tenants in common in equal shares all shares in the companies [X, Y and Z] registered in my name at the date of my death AND I DECLARE if in the division of such shares in accordance with the terms of this Clause 9 of this my will the shares are not divisible by three (3) my daughter ... is to receive more of such shares than my said sons so as to achieve the intent of this Clause.”

The key question before the court was what should be done where the number of shares on issue were two, and were therefore not divisible by three.

The court confirmed a number of key principles, as set out below.

Tenants in common is a concept well known to the law which has an accepted meaning. It is a form of co-ownership where each owner has a distinct but undivided share in the whole, in common with the others. It is not individual ownership of split-up parts.<sup>40</sup>

Although it was an issue not needed to be determined to resolve this case, it was confirmed that the proposition that a chose in action cannot be held by tenants in common is not universally true, particularly when the authorities were written centuries before the rise of the joint stock company. That is, the court confirmed that there is no reason to think that universal statements about choses in action continue to apply to Australian shares, many aspects of which have changed by later legislation.

For example, the court said that it was at least arguable that the effect of the *Corporations Act 2001* (Cth) (which defines the nature of shares as personal property) is to enable the legal title to shares to be held in co-ownership, either as joint tenants or tenants in common.<sup>41</sup>

Where, as in this case, there is ambiguity with a clause in a will, the court can impute wording so that it best accords with the effect which the willmaker is taken to have intended.<sup>42</sup>

In this case, the clear intention of the willmaker could be achieved by the three children (as executors) holding the shares on trust for themselves as tenants in common in equal shares.<sup>43</sup> This equitable remedy meant that it was unnecessary for the court to decide whether the legal title to shares held by co-owners must be held by them as joint tenants, or whether the legal title to the shares can be held as tenants in common.

Furthermore, although partition of property held by tenants in common was not an available remedy at common law, statute has long-provided the remedy of partition, that is, the division of property held in co-ownership (other than chattels) by court order. In this case, s 66G(1) of the *Conveyancing Act 1919* (NSW) was relevant as the court could use that section to order the co-owners to vote in favour of a share split of the ordinary shares on issue.<sup>44</sup>

Practically, the case highlights the importance of a holistic approach to estate planning and ensuring (for example) that the number of shares on issue in a company are divisible by whole numbers. 120 shares on issue is a popular choice, given it is divisible by multiple numbers, including 2, 3, 4, 5, 6, 8, 10 and 12.

A related issue is that, generally, share splits (if permitted by the company constitution) are significantly preferable to share allotments, as splitting (unlike allotment) should not have any adverse revenue consequences.

An iteration on the issues here can come up in the estate planning context where, for example, a couple own shares in a private company as joint tenants and there is a desire to “sever” the joint ownership to ensure that each spouse owns a whole number of shares.

As noted above, all capital assets, including shares, are deemed to be owned as tenants in common (even if at law they are owned as joint tenants). This means that each spouse is deemed to own a 50% interest in each share.<sup>45</sup> However, as noted, if shares cannot be owned as tenants in common, to achieve the desired outcome, it would be necessary to transfer a discrete number of shares by the couple jointly to each of them individually.

Therefore, while changing from joint tenants to tenants in common is not a CGT event, if the holding of each share is changed from joint to only one of the two previous owners, a CGT event will be triggered for every half-interest in every share.

Interestingly, however, the ATO is on public record as stating that:<sup>46</sup>

“Shares can also be owned in unequal proportions. You have to be able to demonstrate this (for example, with a record of the amount contributed by each party to the cost of acquiring the shares). Dividend income and franking credits are assessable in the same proportion as the shares are owned.”

While this ATO statement does not expressly confirm that share ownership in a company can be as tenants in common, arguably, this conclusion is implicit as ownership as joint tenants can never be proportionate.

## Conclusion

In the 2026 version of estate planning, advisers will expose their clients (and themselves) to risk unless a holistic approach is embraced, particularly around the interplay of legislation relating to tax, trusts and jointly owned assets. To coin a phrase mentioned in previous articles that remains critical in every holistic tax and estate planning situation, “estate planning always needs to be more than a will”.<sup>47</sup>

Furthermore, as has been the case in each of the last few years, in 2026, there are fundamental reasons why specialist tax and structuring advice will remain critical components of any holistic estate planning exercise – with any will merely being one part of a much broader landscape.

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- 47 Arguably attributed to most specialist, holistically aware, advisers.



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# Farm equity partnerships

by Tony Eyres, Executive Director,  
Rounding Up

Australian agriculture faces a dual challenge: the need for significant capital to fund growth and the imperative of effective succession planning amid an ageing farming population. This article explores farm equity partnerships as a viable solution, enabling family farms to attract external investment while retaining operational control. It examines demographic trends, ownership structures, and the evolving role of women and professionals in agriculture. Traditional reliance on debt is contrasted with emerging interest from outside sources of equity capital, including offshore entities given Australia's stable investment environment. The article outlines key features that make farming businesses attractive to equity partners, and emphasises the importance of governance, the alignment of interests, and realistic investment horizons. Succession planning is reframed as an opportunity to integrate diverse skill sets and redefine roles across generations. Ultimately, farm equity partnerships offer a pathway to sustainable growth, intergenerational wealth transfer, and long-term resilience in Australian agriculture.

## Overview

In 2025, the family farm remains the cornerstone of Australian agriculture, producing the majority of the sector's outputs. These products and services generate economic wealth through domestic and export markets, and contribute to the social fabric and natural resource management across rural, regional and remote Australia.

The increasing scale, sophistication and complexity of farming businesses demand substantial capital to fund growth. Concurrently, the farming community faces an ageing demographic, with fewer families choosing to pass on ownership and operational management to the next generation, or at least those that do are delaying the transition as long as possible.

Family succession presents challenges in balancing individual wants and needs, while also offering opportunities to explore alternative pathways for inter-generational wealth transfer that do not hinder the growth aspirations of farming businesses. Industry and societal norms are

evolving with regard to farm inheritance, with greater recognition of new and diverse skill sets within family members involved in the business.

The impending inter-generational transfer of wealth in agriculture necessitates effective succession planning. Current practices prioritise family harmony, but there is a need for strategies that accommodate the ageing population and integrate younger generations into farm management, decision-making and ownership. There needs to be alignment between all parties for it to be a success.

Traditionally, debt has been the primary source of capital for Australian farms to fund growth. Aggregate lending increased from \$114.2 billion in 2021–22 to \$120.5 billion in 2022–23. Banks and non-bank lenders, including government agencies, play crucial roles in providing financial support.

There may be varying appetites for risk, an aversion to continually increasing farm debt, and a desire to consider external economic interests that could offer different relationships, new ideas and alternative ways of growing the farm business.

There is a recognised need for external equity capital, as internal sources are insufficient to fund growth. While Australian superannuation funds have not heavily invested in farmland, offshore pension funds and other institutional and private capital view Australian agriculture as a stable investment opportunity.

Farm equity partnerships have been explored as a method of attracting the required capital to fund growth for nearly 20 years. This approach allows the family farming businesses to retain control of operations, leveraging their local connectivity to identify, acquire and integrate additional assets into the business, delivering desired returns for all involved.

While not for everyone, this article discusses how a farming family might consider inviting external equity capital to sit alongside the family's equity to achieve agreed objectives. This is done in the context of the farming business, its ownership and succession planning considerations. Potential sources of equity capital, what investors seek from investments, and what is required to make a family farming business attractive to such co-participation by an equity partner are each described.

While there is a substantial need for investment in Australian agriculture, attracting external equity capital requires careful consideration of ownership structures, governance and the alignment of interests between family-owned businesses and potential investors. Let's take a look.

## Current situation in Australian agriculture

Australian agriculture is important, to Australia, and to Australians, from a societal, economic and resource management perspective. The federal government's resource economics agency, the Australian Bureau of

Agricultural and Resource Economics and Sciences (ABARES), reports that Australian agriculture accounts for 55% of land use and 74% of water consumption, generated 10.8% of goods and services exports (\$71.5 billion in 2023–24), and contributed 2.4% of value added (GDP) to the economy in 2023–24.<sup>1</sup>

The following provides an overview of the current farm family and the related business undertaken on those farms across Australia. The current demographic and ownership, including structures, provides context for different ways to consider attracting the required capital into these farm businesses to fund continued growth. This will allow farm businesses to continue to deliver the products (farm produce) and services (landscape management) in a sustainable and enduring manner.

### Who is working on the farm?

The agricultural sector is a major employer, in particular in rural, regional and remote parts of the country, contributing significantly to the economic and social fabric of many communities. Based on Australian Bureau of Statistics (ABS) census data, the median age of agricultural sector workers was 50 years in 2021, unchanged from 2016 and still some 10 years older than the median age of the general Australian workforce (see Figure 1). Between 2016 and 2021, the proportion of agricultural workers aged 65 and older increased from 18% to 20%, while the proportion aged under 35 increased from 24% to 25%.<sup>2</sup> These figures highlight the considerable and growing age of our farmers, albeit with some younger entrants joining the industry.

The ABS defines farming families as families where at least one person is a farmer or farm manager. In 2021, there were 88,873 farming families of which 47% were a couple without children, compared with 39% for all Australian families,

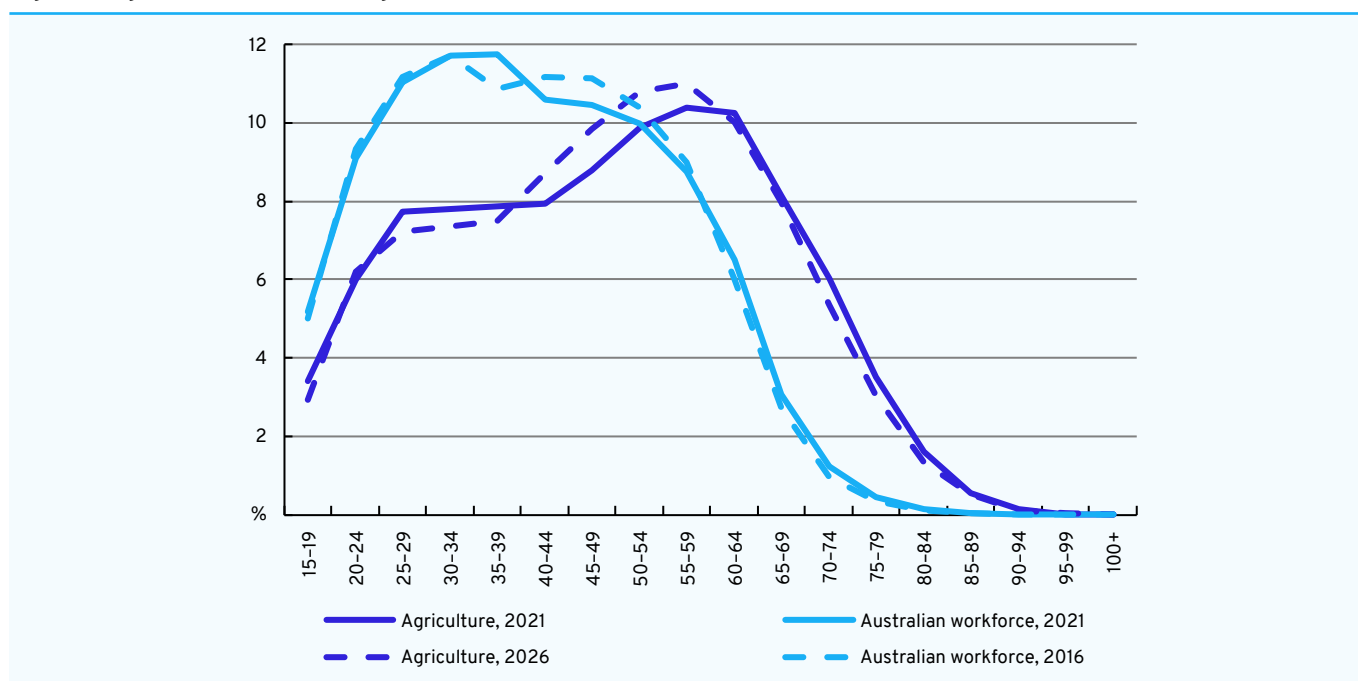
indicating that many farming families are likely to have older children no longer living at home (see Figure 2).<sup>4</sup>

### Who else is involved?

In Australia, as observed by Robyn Alders in a paper for the Australian Institute of International Affairs, the invisibility of women in agriculture has long been facilitated by the local policy environment. In 1891, a decision was made to not count farming women in the censuses of the colonies, and post-Federation, women were not legally considered farmers until 1994.<sup>5</sup> While this anomaly has largely been addressed, to simply define those employed by farm businesses as either managers, labourers or technicians and tradesmen does not wholly describe the many professionals who now share their expertise and knowledge along the agricultural value chain. A recent study found that some 40% of the 13,390 people (circa 6,000) who comprise the professional agricultural services sector do not work exclusively in agriculture, although they are making important contributions to it.<sup>6</sup>

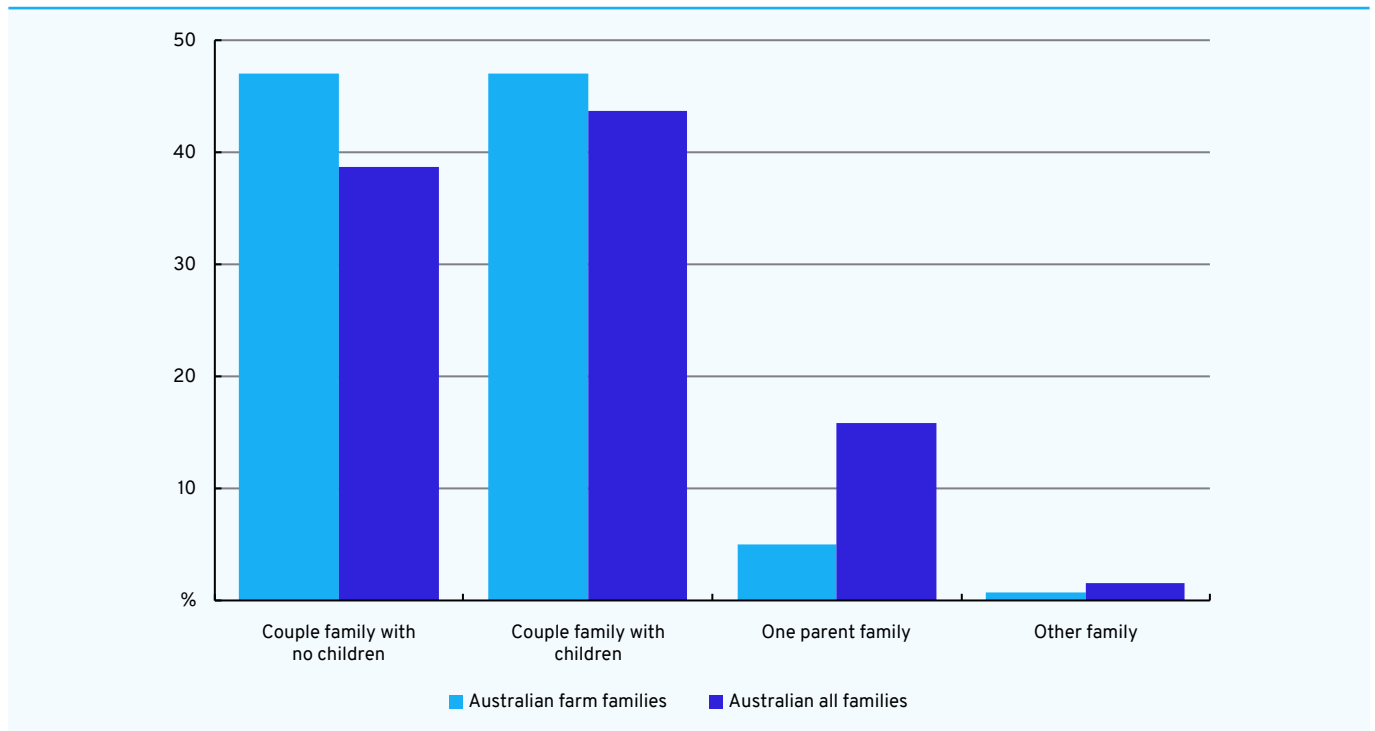
Farmers are required to address the greater scrutiny on sustainability practices driven largely by consumer, corporate (customers, banking providers), regulatory and other government expectations. At the same time, they need to keep up with rapid technological innovation, some of which assists with the traceability and accountability required, while continually driving costs out of their businesses. This has seen these farm businesses become more dependent on farm consultants and market analysts, legal and financial experts, and scientists as they pursue economies of scale and efficiency improvements to remain competitive. Managing this diversity of employee has also made HR managers or external HR consultants a feature for some medium to large enterprises to help attract, develop

Figure 1. Agricultural workforce age distribution, 2016 and 2021



Source: ABARES.<sup>3</sup>

Figure 2. Farm family household composition, 2021



Source: ABARES.<sup>7</sup>

and retain key personnel. This is a skill set not readily found in many family farming businesses, as they have relied on highly directed and often patriarchal approaches to management.

### Who owns the farm?

ABS data indicates that, as at June 2022, there were 87,800 agricultural businesses with an estimated value of agricultural operations of \$40,000 or greater in Australia.<sup>8</sup> This reflects a considerable decline in the number of broadacre farms in Australia over the past 20 or so years (see Figure 3).

Despite this decline in the number of individual farm operations, as a result of farm consolidation to achieve economies of scale, 99% of all registered farm businesses are Australian owned and operated,<sup>9</sup> counter to some outward perceptions that we are “selling off the family farm”.

Foreign land ownership remains modest, with 91% of the total 369 million hectares of Australian agricultural farming land (farmland) owned locally (see Figure 4) as of 30 June 2023;<sup>10</sup> the remainder has a share held by a “foreign person”.<sup>11</sup> Foreign owners tend to own larger land holdings, predominantly pastoral beef and sheep operations, which explains the disparity in the number of locally owned and operated businesses (99%) compared to local land ownership (91%).

### What is the ownership structure of the Australian farm?

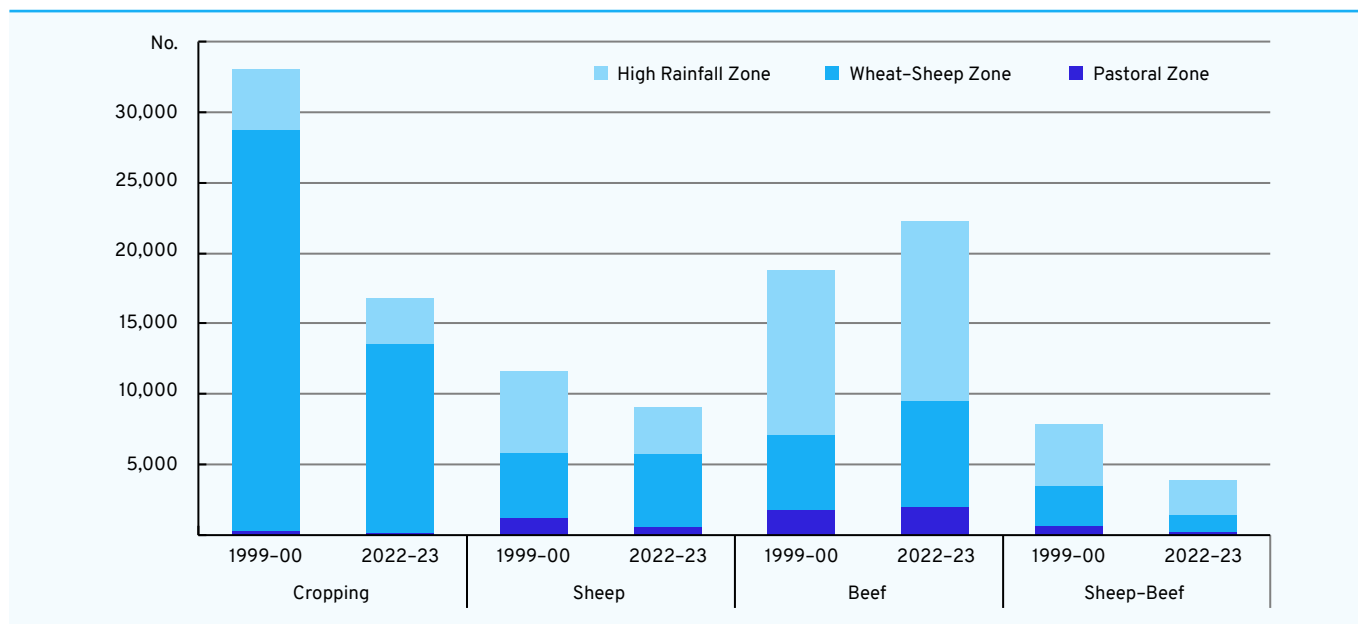
The Australian Farm Institute’s “Funding Agriculture’s Future” conference in 2014 provided insights into the reality

of investment in Australian agriculture – leading to the conclusion that, while there is significant local and offshore interest in investing in the sector, the family farm structure is more than competitive with most available alternatives.<sup>12</sup> More than 10 years on, it is constructive to consider whether this proposition still applies.

Due to the majority being family owned and operated, most farms have sole trader or proprietary limited company structures in place. The prevalence of discretionary family trusts is increasing in order to better manage the sharing of commercial outcomes between family members, and in some cases, to separate the farmland asset ownership from the operations. There are other commercial arrangements such as share-farming where the owner allows an operator to farm the land and takes an agreed amount of any returns generated, often done at a smaller scale. This can be a useful precursor for a new entrant or small operator to get a start, build some equity in a business, with an eye to buying their own assets in time. A variation is to lease land with an option to buy, at a pre-agreed price or at least an agreed methodology that will be used to determine a value in the future, although the recent dramatic increases in land values have made this challenging to implement.

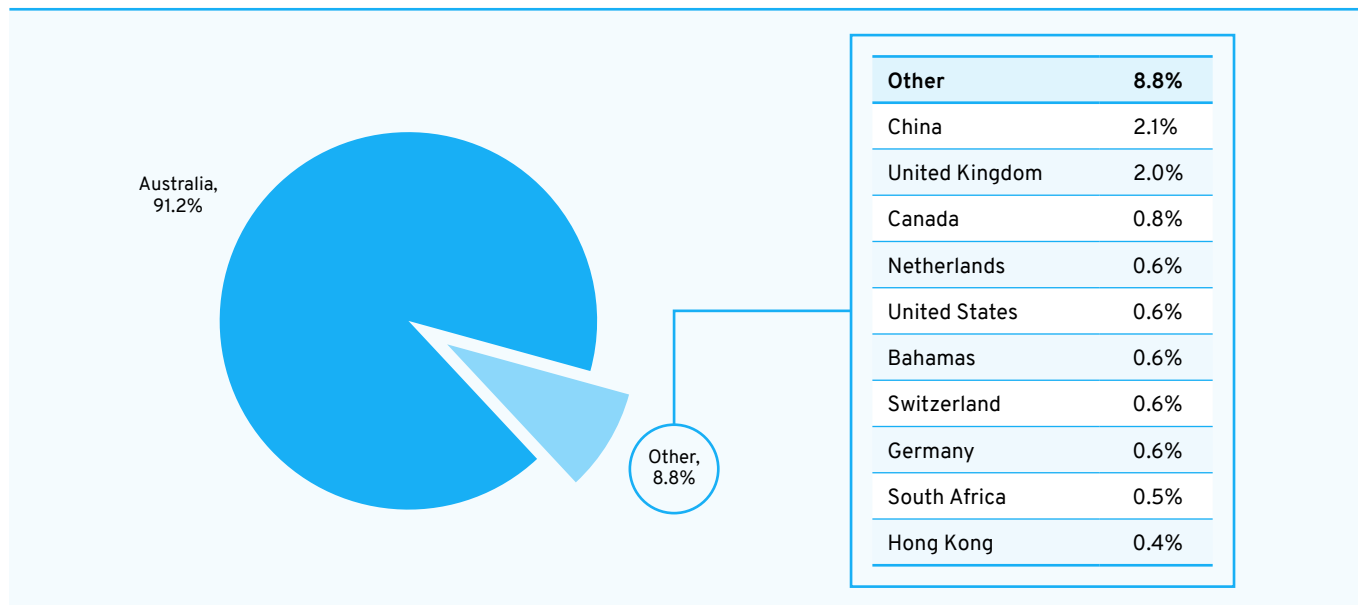
Outside of family-owned businesses, there are many different examples of business ownership. These include direct ownership, by listed and unlisted corporations from Australia and overseas, into local company and trust structures that meet their stakeholders’ needs, including governance, tax and other considerations. Some institutional investors, such as university endowment funds and other superannuation and pension fund style investors, own farmland and rent these to operators,

Figure 3. Number of broadacre farms by zone, Australia, 1999–2000 and 2022–23



Source: ABARES Australian Agricultural and Grazing Industries Survey, conducted by ABS.

Figure 4. Foreign ownership of agricultural land in Australia, by country, 2023



Source: ATO's Register of Foreign Ownership of Australian Assets.

choosing to not undertake farming operations themselves. Under this structure, finding suitable tenants who will pay the desired rentals can prove difficult in a deregulated agricultural market and economy like Australia, with one of the lowest levels of government support (farm subsidies) globally. Others have an “own/operate” model where they hire staff and build a corporate structure to support the farming activities, although the ability for farming businesses to sustain this over time has seen few survive with such a fixed cost burden, even if they have achieved considerable scale. This embedded cost has also seen few agricultural production companies successfully stay listed on stock exchanges, not helped by a seemingly low level of understanding by shareholder investors of the seasonality

and other risks associated with agricultural production in Australia.

Alternative structures that meet the needs of the investors, the farm operators and the rural communities in which they operate will need to be explored, this being one area of Australian agriculture that has not seen great levels of innovation in the past.

### Who is financing the farm?

Traditionally, the most common source of capital for growth in Australian farm businesses has been debt, primarily to fund land purchases and to provide working capital throughout the year to manage seasonal conditions.<sup>13</sup>

This debt capital is sourced largely from the big four local banks<sup>14</sup> and the global rural lender, Rabobank, with other smaller banks and non-bank lenders each having a modest market share. These other lenders include the federal government’s Regional Investment Corporation with a role as financier of last resort in certain instances, while its sister agency, Export Finance Australia, similarly offers capital where there is an export angle.

Transparent sources of baseline and longitudinal data on debt capital in Australia’s agricultural sector include the Australian Prudential Regulation Authority (APRA) reporting standard ARS 750.0 *Agricultural Lending* that requires authorised deposit-taking institutions or registered financial corporations to disclose lending and leasing for agricultural activity, and the extent to which those loans and leases are past due or in distress.

APRA reported that aggregate lending to the Australian farm sector, calculated as the total value of loans and leases outstanding at 30 June each year, has increased from \$114.2 billion in 2021–22 to \$120.5 billion in 2022–23, an increase of 6% in real terms (see Figure 5, noting that each column shows the value of loans and leases outstanding at 30 June, in 2023–24 dollars).

Other reference data includes the Reserve Bank’s monthly update on industry share of business investment and the Department of Agriculture, Forestry and Fisheries (DAFF) statistical reports on the farm management deposits (FMD) scheme that allows primary producers to make tax deductible deposits into an account during years of good cash flow and withdraw them during less favourable seasons. Supported by ABARES analysis, DAFF has developed annual key performance indicators for FMD, which provides another a good lead indicator of profitability of the sector.

Tracking equity capital and its performance, including family farm equity, is not always as readily possible. In the United States, where institutional investment is more entrenched and longstanding, there are well-established performance

benchmarking services (supported by the US Treasury and the Department of Agriculture that administer the US Farm Bill) that report on farmland performance.

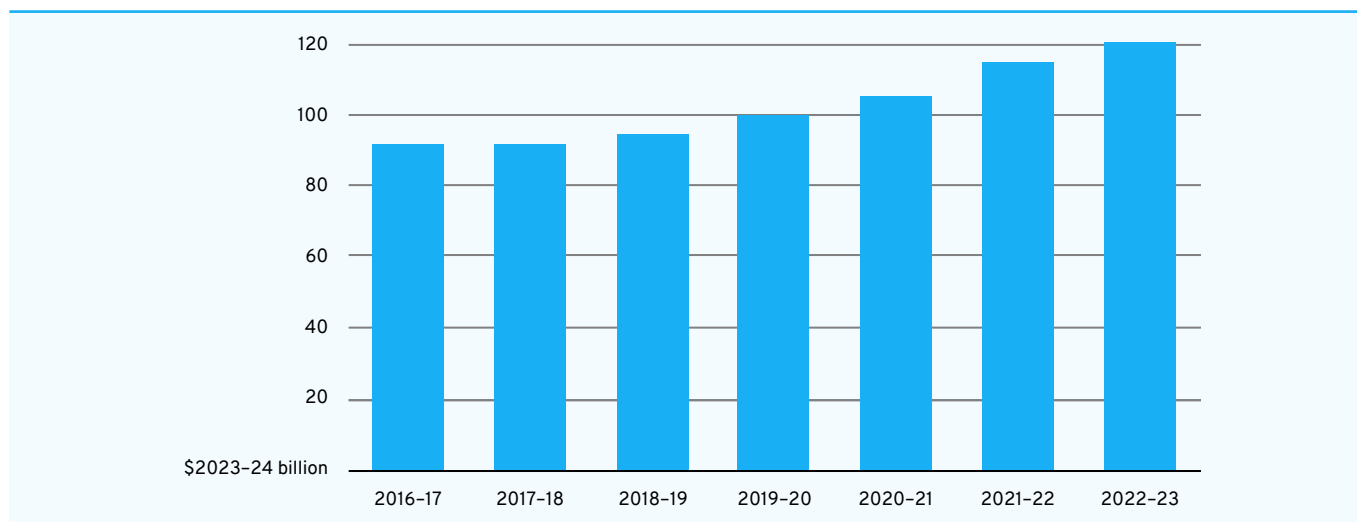
The National Council of Real Estate Investment Fiduciaries (NCREIF) serves as a data hub for institutional real estate investors, publishing investment performance indices and transparent data for US commercial properties, including farmland and timberland. Members can choose to submit data to NCREIF for inclusion in its various indices and data products that are discussed at biennial conferences, webinars and regular standing committee meetings that are open to all of its members. Efforts have been made, and are ongoing, for a similar benchmarking collaboration to be supported in Australia, although far lower levels of institutional ownership and government support (payment of subsidies that demand greater accountability on performance) have seen variable participation and mixed results.

### Who will take on the farm?

Considering the demographics of Australia’s farm ownership, there is expected to be a large inter-generational transfer of wealth in agriculture over the next 10 years involving both land and, where they exist, water assets such as entitlements that are allocated for irrigation, based on seasonal availability.

The various stages of succession include the decision to retire, identifying a successor, transferring control, and the legal transfer of property followed by changes to the structure and nature of the business.<sup>15</sup> Current practices in Australian farm succession planning prioritise the importance of maintaining family harmony and the need to address the challenges faced due to the ageing farming population. Keeping the farm in the family is widely recognised as crucial for maintaining cultural identity and community ties, with a strong focus in Australia on passing it down through the male line, like many other parts of the world.

Figure 5. Aggregate lending to the farm sector, 2016–17 to 2022–23



Source: APRA.

There is a necessity to have strategies to assist farmers in coping with succession planning to secure the future of family farms and the broader agricultural industry. These need to be considered early and often to avoid pitfalls of addressing aspects too late. There can be a reluctance of farmers to retire due to their strong work ethic and the negative impact of retirement on their sense of purpose. This makes it important to engage professional advisers in estate planning and to have effective communication within farming families to ensure a smooth succession process.

In speaking with those providing succession planning services, the key aspect to establish early in any such conversation is alignment between all parties. The considered effort by the accountant and family lawyer to pull together relevant materials and to draft documentation can all start once this alignment is in place. The importance of being able to ask many salient questions and listening to the answers, early in the process, can help attain this alignment. If everyone is a little bit disappointed in the agreed outcome, you have most probably done the required job.

Many people focus succession efforts on the needs of the next generation (sons and daughters, and their spouses/partners if present) without always considering how the business can best provide for the current generation (Mum and Dad) to be more independent of the farm and its business activities. This might include proactively bolstering amounts held in superannuation or other off-farm assets that generate an income. The adage that “my farm is my super” does not help when trying to manage succession. Equally, the costs associated with moving ownership of assets in or out of existing ownership structures, such as stamp duty and other taxes which vary state-by-state, are a key consideration. Creating further complexity through additional regulation is also not the answer as this may see assets stuck in current ownership until death, rather than a more orderly exchange between generations or onto other beneficial owners of agricultural assets.

Newsome et al notes, in a 2024 paper, that sons are usually seen as the ones to assume operational control of the family farm, while daughters-in-law can get sidelined, harking back to some old mindsets on the role of women in agriculture.<sup>16</sup> This is despite them doing a lot to keep the farm running and supporting it financially through off-farm jobs, let alone their on-farm work and critical, non-financial contributions to the fabric of the household, family and community. Complexities of family farms, where it is a place of carrying on a business while also being a place of living and often raising a family, require a level of mutual understanding and arguably conditioning, up front. This effort should hopefully make for easier conversations around succession when that time comes.

There have been calls for succession planning to better adapt to today’s social and economic realities, highlighting the importance of daughters-in-law skills and the challenges they face. Meanwhile, fears of instability in a marriage and the possibility of “losing half the farm to an ex-wife” can further cloud thoughts and discussions. The increasing asset

values and the need to ensure the financial security of all family members, regardless of gender, have also added complexity to the succession process.

A desirable outcome from any succession plan sees the individuals that want to be involved, going forward, for the right reasons being able to do so with a sense of belonging, the ability to make a positive contribution, and feeling valued in seeking to achieve the future goals and ambitions for the farming business. This should be done while accommodating the needs, as much as practicable, of those who are to progressively relinquish direct involvement and those who are not stepping back into the business.

People are the best assets of a business. When defining an investment project, some advisers like to talk about people, then project, then pathways, then projections, then profits, then probabilities. Managing succession is not so different, needing to have a shared perspective on what the future might look like for the family business, how to get there, the expected outcomes and financial returns, then the risks of it not going to plan. However, the people must come first as they will ensure that all of the other aspects are delivered. This includes the current and future generations.

Using succession planning as a platform to expand a farming business can allow for redefining roles and responsibilities and make even better use of the diversity of skill sets that may reside in the next generation. This may include more extensive international experience, softer “people” proficiencies, sales and marketing, technology development and adoption methodologies. These may or may not be grounded in a family farming upbringing which understands the farm as a business, the importance of hard work, timeliness of operations, making time to contribute to the wider community, and being engaged in industry issues and local representation.

## The role for equity capital to fund growth

The welcome mat was substantively laid out to global investors in a seminal paper published by the ANZ Bank in October 2012<sup>17</sup> that stated Australia would need A\$1 trillion in additional capital investment to achieve an additional A\$710 billion in agricultural exports between 2011 and 2050.

This call for further investment recognised that Australian farms face significant constraints around funding succession plans and farm turnover, making internal sources of capital insufficient to fund growth, therefore requiring support from external investors.

Despite Australia’s compulsory superannuation funds continuing to grow rapidly and expected to overtake the United Kingdom and Canada’s pension funds to rank globally as the second largest pool of investment funds behind the US, few have invested in Australian farmland. The small number of local funds that have invested in farmland have either held on to modest holdings as a percentage of their total funds under management, or they have exited and not returned, deeming it not attractive as an asset class in their overall portfolio of investments.

Conversely, offshore pension funds and university endowment funds have seen Australian farmland as a great place to invest for the medium to longer term, supported by a democratic system of government, strong rule of law, transparency of regulations, and clear title to land and water assets.

There is a diverse investor base of institutional and private investors with current, or a stated desire for, exposure to farmland globally, including Australia – pension funds, global funds, university endowments, high net worth (HNW) and ultra HNW individuals, and, at times, trading companies and other multinational corporations (see Map 1).

These often larger investors have the capacity and interest to further invest in key enabling infrastructure in rural, regional and remote parts of the country, benefiting both agricultural output and community wellbeing. This benefit can be inter-generational, wide-reaching, and economically empowering for local communities, if made in the right areas with the right intentions.

**Case study. Canadian pension funds as an investment partner**

Over the past decade, Canadian pension funds and companies have significantly invested in Australia, particularly in agriculture, outpacing Australian investments in Canada by a ratio of three to one, according to Flintoff in his Guide Business article from October 2021.<sup>18</sup>

A specific example is Montreal-based PSP Investments which had amassed around \$4 billion in Australian agricultural assets by mid-2021 and has continued to

expand in recent years. Fortunately, Canadian investments in agriculture have received generally positive media coverage in Australia. This contrasts with more critical reactions to Canadian investments in other sectors such as healthcare, along with negative sentiment around agricultural investment from other nations, in particular China (see Map 2).

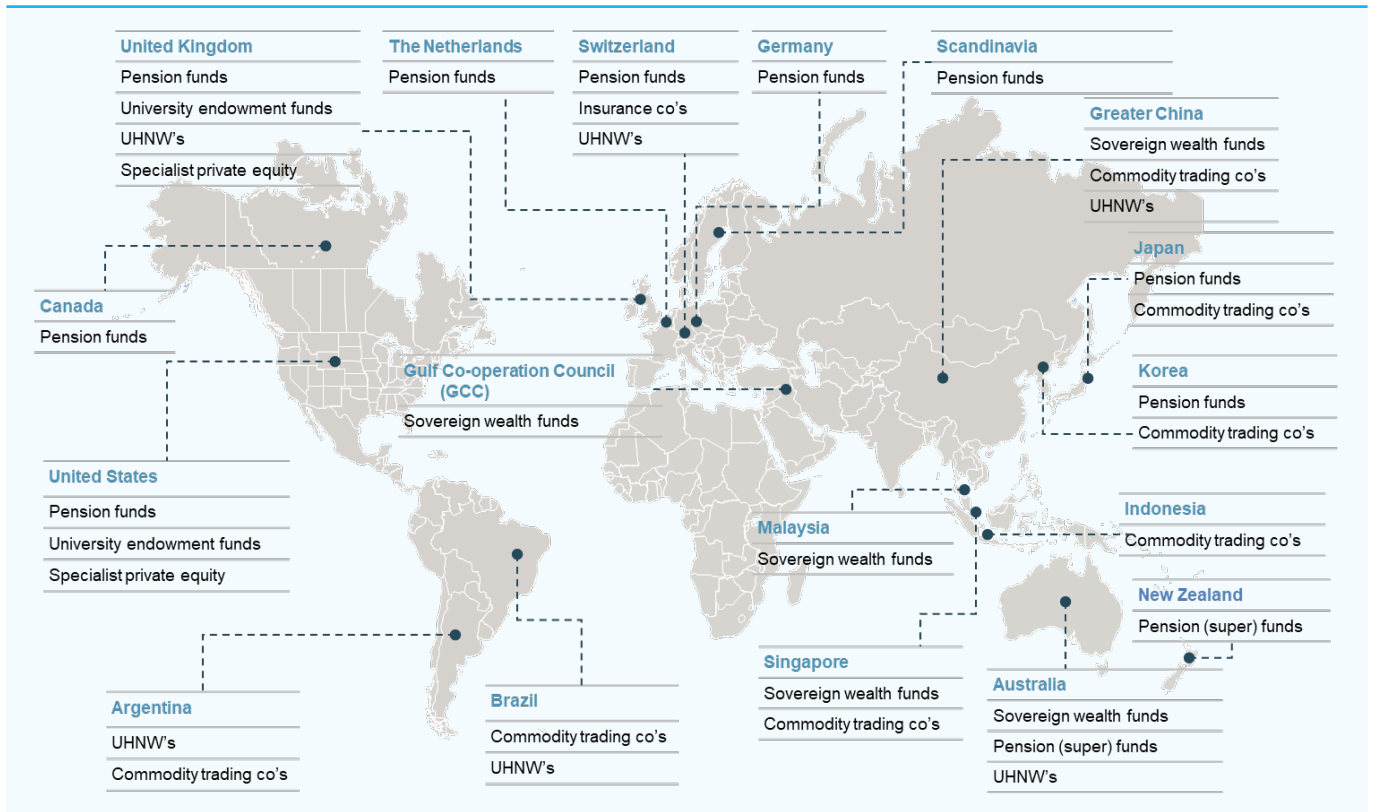
**External equity capital considerations**

**For the farmer.** The potential influx of investment raises questions about current ownership structures in Australian agriculture and highlights the importance of stability and forward-thinking in attracting demand for equity capital, if that is seen as a solution to future plans for a farming family-owned and operated business.

A farmer needs to consider the impact of bringing in external equity, to sit alongside the family equity, in concert with any bank or other debt in the business. This outside equity capital will introduce a different dynamic to the family farm by adding a different surname into the mix and bringing associated accountabilities that come with accessing someone else’s moneys.

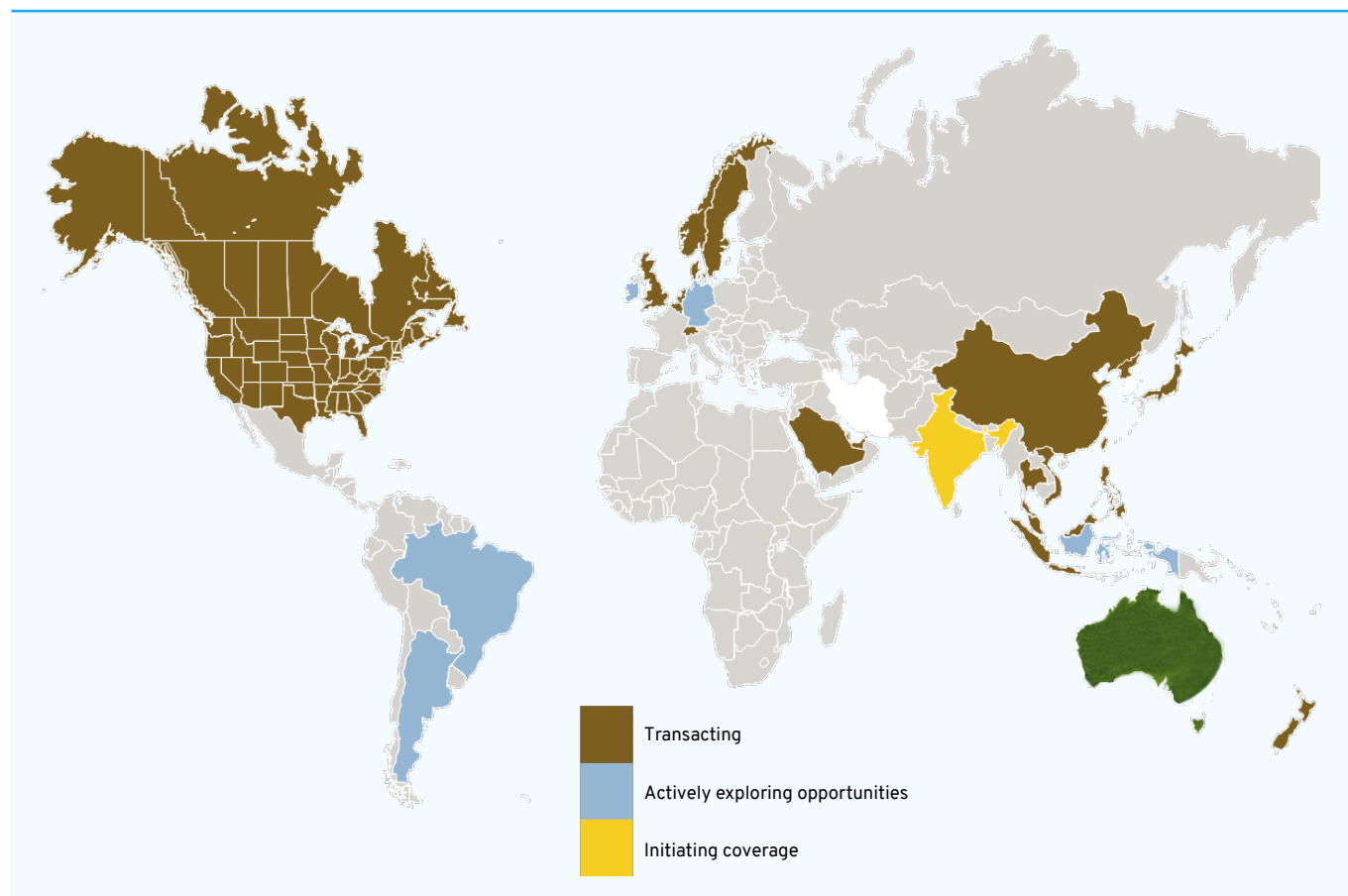
An early consideration for farming families is not whether they want the funds, more so whether they are they ready to attract such an external investment. This includes things like the level of sophistication of current financial and business performance reporting, governance structures, if any, that are in place, and most importantly a well-considered and detailed plan of where they want to take the business. Having a clear and concise business plan, including the key

**Map 1. Investor types with current, or a stated desire for, exposure to farmland globally**



Source: Rounding Up.

Map 2. Growing weight of capital targeting direct exposure to Australian farmland



Source: Rounding Up.

people identified and profiled who will achieve the stated goals, is critical. Exactly what the additional equity capital will be used for, and the projected financial returns from that investment, will all need to be laid out for an incoming investor. A strong business track record, positive banking, and healthy and diverse customer relationships are other aspects an investor may look for in a potential business to invest in. These are all essential elements to instil confidence in a potential investor in the farm business.

Not having all of these elements, upfront, does not mean that a farming family cannot attract an investor. However, it does raise the question of investor-readiness and whether this is a current option for the business.

Thinking of what else the external equity can provide to the farm business, other than capital, is also important. This might be improved governance, greater access to key customers, new and better relationships in the supply chain, or hopefully all of these aspects. If the only thing that the external equity provider (co-investor) is bringing to the table is money, perhaps more debt might achieve a similar goal without the extra effort and angst that might be involved.

**For the investor.** Australian agriculture, in particular the land and associated farm operating businesses, is highly fragmented, being largely family owned and operated, with few large-scale assets available to purchase walk-in, walk out. Many individual assets are tightly held by multi-generational, family farming operations, and the

ability to acquire, aggregate and then successfully manage large portfolios is limited. Add to this Australia's largely deregulated and highly variable production environment, which is not well understood by so-called sophisticated Australian and foreign investors alike. Then the plethora of emerging technologies available for investment and deployment into Australian agriculture, developed locally and overseas, with their commercial "use case" not always clear. To top it off, the "thematics" proliferating around sustainability, environmental, social and governance, decarbonisation and ethical investing that seem somewhat confusing to those espousing them, let alone the many current farm business owners and operators and their communities.

All investors will be required to navigate Australia's complex regulatory environment, which can vary by jurisdiction, and gain an understanding of local, state and federal political considerations in play to ensure a positive outcome from their investments. This pathway can be aided by having a credible operating partner who is familiar with the local region but who can also act as an advocate for gaining required approvals for the investment. One might consider how Mrs Gina Rinehart AO managed to gain regulatory approvals for the Chinese co-investment in S Kidman & Co by positioning as a strong local partner. This is particularly relevant for foreign investors seeking approval from the Department of Treasury's Foreign Investment Review Board. Investments are screened under a national interest test that

considers various factors, including taxation, competition, national security, and the potential impact on local communities and resources.

On the issue of national interest, an ABARES report on foreign direct investment (FDI) in Australian agriculture by Dr Gita Nandan<sup>19</sup> outlines several benefits, including access to global capital markets and reducing the cost of capital for investments in agriculture, which can lead to enhanced productivity and economic growth. Helping Australian producers integrate into global value chains and enhance their market reach, while facilitating the introduction of new technologies and management practices that improve productivity and competitiveness, are further benefits. These positive aspects should be clearly articulated by the incoming moneys to help garner support for investment in the Australian farm business, alongside the family interests, then nurtured post-investment to maintain good social standing within the communities in which these businesses operate.

The ABARES FDI report also indicates that, despite the benefits, significant concerns regarding overseas investment pervade among the community, such as the control of farmland and agribusinesses that provide important products and services to the sector that may jeopardise Australia's long-term access to food and agricultural resources. Striking the right balance is the ongoing challenge facing the various agencies and departments within government charged with giving confidence to the Australian people around probity and governance, while providing certainty for investors weighing up investment opportunities in multiple jurisdictions around the globe. Investors are attracted to Australia's democratic principles, strong rule of law and transparency, each adding to investment certainty, but only to a point. Keep changing the rules and introducing aspects of sovereign risk and they will run a mile.

These various aspects contribute to an outcome where, despite a need for greater investment in Australian agriculture and a large weight of capital looking to be deployed, there are still few large-scale investors transacting, countering the perception that we are "selling off the farm". A number of those that have invested soon make a hasty retreat, scale back considerably, or change their operating model after not being able to achieve the stated financial or operational goals.

For current and new entrants, in most cases this comes down to partnering with the right people. The investors will need to bring a match of skills and sophistication and an alignment of shared objectives to make things work, all wrapped in a construct that is "investment grade" in terms of structure, the abilities of key people, the assets, and the relationships along the value chain.

## Farm equity partnerships: meeting capital needs of farming family businesses

The agricultural industry is evolving, and there is potential for larger-scale investments amid rising land and

commodity prices and the seemingly endless pursuit of scale while digital technologies are continually evolving to enhance traceability and efficiency. Investors are not just seeking profitability, they are also seeking stability and continuity to ensure that the assets consistently appreciate in value and are readily available for a sale, if and when the time comes to exit.

A good local partner with the required management and technology skills, sophistication of approach, and a similar, long-term view of the assets can be valuable to an investor. The local farming business partner can also provide one possible method of exit for an investor, if pre-emptive rights to acquire the assets can be agreed upfront, subject to being able to finance the transaction through additional sources of equity, debt or the partial sale of some assets at the point of sale. Professional services firms will be required to advise of suitable structures that meet the needs of both parties. This could include "ring-fencing" certain key assets, such as an original family homestead, in the event of dissolution of the partnership.

Professional services firms, banks and other intermediaries are needed to work with investors to find the right local partner, often family-owned and operated businesses, that are investment ready and with the right balance of skills and experience to take on growth opportunities. This business can use its connectivity and local knowledge to identify suitable assets to acquire, aggregate and operate to the desired level of scale.

## What is needed in a farm equity partnership?

To present as attractive to outside equity capital and ensure alignment with incoming investors, a farm equity partnership should be a successful, large-scale operator with proven risk mitigation strategies and have:

- inter-generational expertise with a blend of youth and experience;
- strong customer off-take relationships;
- clear growth strategies with defined capital needs, target assets and returns;
- strong existing debt relationships with moderate financial leverage; and
- equity investment by the farming family operator.

## Examples of farm equity partnerships

Previous projects developed and tabled with investors include:



**Pastoral beef cattle:** A\$50 million (for a 45% stake) in a large beef cattle business operating across the pastoral regions of Queensland, to fund an expanded operation to 259,000 hectares able to stock ~42,000 head, with A\$145 million of future plans including value-adding.



**Sugar cane:** A\$100 million (for a 90% stake) in Australia's then third largest sugar cane producer to expand operations, all solely in the

Burdekin Irrigation Area of northern Queensland, recognised as the lowest 10% cost of production region, globally.



**Intensive dairying:** A\$40 million (for a 50% stake) in a large-scale, intensive dairy facility in regional NSW, to fund doubling of the milking herd (2,000 to 4,000 cows) to more than double the milk production, with a A\$60 million second stage.



**Sheep meat and wool:** A\$50 million (for a 50% stake) in a substantial, vertically integrated sheep meat and wool operation in south-west Victoria, to acquire additional land, livestock and associated assets.



**Chicken meat:** A\$32.5 million (for a 90% stake) in a chicken meat producer, to develop a new broiler farm in the New England region of northern NSW.



**Small-crop horticulture:** A\$35m (for a 40% stake) in a small-crop (horticulture) operator, to consolidate number 1 supplier position in selected fresh produce lines by ensuring year-round supply from several east coast regions, mostly in Queensland.

## Conclusion and next steps

Australian agriculture needs to continually to attract and deploy capital in a professional and productive manner to be able to grow outputs and generate value and returns. A modest number of successful and ever aspirational farming family businesses have the potential to accelerate their growth while managing succession outcomes by introducing equity capital outside of their family investment interests.

This external investment into a farm equity partnership will change the dynamic within the business, with the potential to highlight capability within the existing family members while bringing in additional skills, networks, capabilities and ideas with the capital.

Managing the attraction, deployment and generation of a return on that investment is a specialised task requiring dedicated external and internal resources to make it a success. This will include the existing professional services providers in the business – accountants, lawyers, bankers, agricultural consultants, and succession planning advisers – all working together with the family farming business to make it investment ready and match fit to achieve the goals and aspirations of the family and the investor. Having one family member leading the charge on preparing for, and executing on, the potential partnership is also crucial.

Institutional funds, and the capital held by HNW and larger corporations, from around the world are seeking to invest, further invest or re-invest in Australian agriculture. What these investors often lack is the right people and the right partnership to make it as successful as possible. A farm equity partnership can deliver the required capital for growth while facilitating a change of roles, responsibilities

and ownership within a family farming business to meet succession objectives.

The most important piece is alignment, first between the family members through a succession plan, and then with the incoming investor through a well thought through business plan. Each of these two plans should have a forward-looking strategy that makes the best use of all elements being brought together in a well-structured partnership that deals with immediate, medium and longer-term considerations.

The evolving landscape of ownership, a drive to achieve scale and seek associated efficiencies, and challenges around attracting and retaining the right people in the right roles are all aspects that present both challenges and opportunities for sustainable growth in the agricultural sector. Sharing these in a farm equity partnership between family farming businesses and external equity capital investment is well worth considering. Now to start the conversation.

## Key points

- There are two sources of capital: debt from banks and equity from investors.
- Businesses open to attracting external investment capital can achieve growth plans while facilitating family business succession.
- Features attractive to an investor include:
  - large existing operations and a successful track record of operating at scale in a defined region;
  - clearly articulated business plans which include growth;
  - existing high-level accounting practices;
  - strong existing banking relationships;
  - broad skills and qualifications of business members; and
  - defined succession and “key man risk” mitigation strategies.
- There are two broad types of investors: financial and strategic, each with differing needs and wants.
- Investors want a preparedness to enhance current governance arrangements to provide accountability.
- Issues of business control and autonomy of day-to-day operations can be managed contemporaneously.
- Many different corporate structures are possible, but that chosen must achieve the objectives of all parties.
- Realistic timeframes for an investor are five to seven years, if not longer.
- Investor exits include the sale of equity between existing investors or the sale of the business to a third party.

**Note:** see the Appendix below for a hypothetical case study.

**Tony Eyres**  
Executive Director  
Rounding Up

This article is an edited version of “Farm equity partnerships – an opportunity for the whole family” presented at The Tax Institute’s Agribusiness Intensive in Brisbane on 1 to 2 May 2025.

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## Appendix. Hypothetical case study<sup>20</sup>

Barry and Maxine Everingham own and operate a mixed farming (grains and sheep) business in the Central West region of NSW. Barry’s father settled in the district in the late 1940s on a soldier settlement property which operated largely as a sheep enterprise focusing on wool production. Several years prior to the reserve price collapse in the early 1990s, Barry had shifted more into cropping through share-farming a few properties in the district while retaining an interest in the family sheep enterprise with his father. In 1992, Barry and Maxine purchased the property from his parents and established the current family farming partnership, with a greater emphasis on grains.

Despite some challenging seasons in recent times, the Everinghams have managed to double their croppable hectares over the past five years through a combination of buying and leasing additional properties in the Central West and North West region of NSW. The current enterprise has total assets of almost \$37 million, with a bank debt of \$22 million, equating to a loan to value ratio of almost 60% and a net equity position of \$15 million for the Everinghams.

Barry and Maxine’s eldest, Andrew, 30, is currently managing a leased property almost 200 kilometres to

the north of the home place. He returned to the business two years ago after 7.5 years overseas working as a corporate adviser with a major global accounting firm, also completing an MBA at INSEAD while based in Europe.

Their second child, Caroline, 28, is currently active in the farm business using her veterinary science degree on the intensive sheep feedlot enterprise. Caroline is engaged to marry in the next 12 months. There is an expectation that she will exit the family business and move to the south-east of South Australia where her fiancé owns and operates a beef and grain property.

The youngest, George, 23, is in his final year of a three-year Advanced Diploma of Farm Business Management at Marcus Oldham Agricultural College in Victoria, where he enrolled after completing a heavy-duty mechanic apprenticeship at the Lake Cowell Gold Mine near West Wyalong.

The family members have always maintained an open dialogue between themselves, holding semi-regular planning sessions to discuss current and future ideas and document these in an updated business plan. These sessions were usually around Christmas when everyone was home from their various work and study commitments. These have become more frequent in recent years as poor seasons and volatility in commodity prices, input costs and

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farmgate returns have focused everyone's attention and Andrew has returned to a day-to-day management role.

The latest session is held the day prior to Caroline's engagement party. Other invitees include the family accountant and a recently retired, senior agribusiness bank manager who had been the Everingham's local account manager for several years before he was promoted to a larger regional centre and eventually Sydney.

Other than immediate plans and concerns about the debt levels in the business, the main agenda item is how best to set up the family business for continued growth, yet facilitate an exit for Caroline, ideally within 12 to 18 months, and Barry and Maxine within five or so years.

It was agreed that there are two sources of capital to fund business growth: debt from a bank and equity from investors. The latter is currently limited to members of the family, primarily Barry and Maxine, but each of the siblings have an equity stake through family trust structures.

The business has a strong relationship with its debt provider, having banked with the same institution for more than 20 years, always maintaining a close dialogue on key decisions and seeing the bank as a real partner. Despite this, the current financial market situation after the global financial crisis (GFC), and an already high debt position, have resulted in their bank being reluctant to continue to lend for expansion. Their former bank manager does point out in the meeting that it is not specific to their bank but across the board, as each retail bank's own access to capital is constrained and the cost of that capital is high. He also noted that there has been a shift in how banks lend to farming businesses – more towards serviceability and cash flow lending rather than the simple loan to value ratio-type lending prevalent in Australian agriculture in the past 10 to 15 years.

The conversation then turns to equity capital and it is quickly determined that any new equity would have to come from outside of the family. Andrew and the accountant lead the discussion around who these external investors might be and what they would be looking for in such an investment, effectively putting capital at risk alongside family equity and debt from a bank. Two broad types of equity investors are identified: those looking for a financial return and those that are keen to invest for strategic purposes.

Financial investors are initially seen as not being of any real benefit because their return expectations would be greater than 20% and anyone who knows farming knows this is not deliverable in a mixed farming operation in the Central West region of NSW, or anywhere else in broadacre dryland agriculture for that matter! The banker explains that, while some investors seek such high returns, many are looking for mid- to high teens as an internal rate of return, which includes cash returns and capital growth from asset appreciation. He notes that these numbers are getting more into the ball park, given

capital growth in property values has been consistently averaging 8% to 10% over the past 20 years in the district. The accountant says that other investors would be happy with a high single digit number but would need consistency in returns, something that has recently proven difficult in much of broadacre agriculture.

Andrew poses the question: what do these financial investors think of agriculture as an investment and how is it compared to other types of investments like mining, real estate, government bonds and infrastructure projects? Barry is of the view that the fact that agriculture has real assets and makes real products was seen as a positive after the trading of pieces of paper that had been going on in the lead up to the GFC. The accountant added that, being linked to inflation and having a return profile counter-cyclical to many of these other types of assets are also encouraging.

It is agreed not to discount these financial investors altogether.

Strategic investors are then discussed and George raises the example of a food service business seeking access to a consistent, secure supply of quality grain to maintain throughput of a processing plant in Southeast Asia. He feels that the likely volumes and the perceived counter-party risk mean that this is not seen as a viable option unless they were producing at least 50,000 tonnes of grain or they have established relationships with other growers to secure such volumes in addition to their own production. Maxine asks about other strategic investors, such as the various sovereign wealth funds from parts of Asia and the Middle East reported in the papers as looking to invest in Australia, for reasons of food security.

The accountant also highlights that Australia is seen as a stable, democratic country with a sound economy. It has a well-regarded financial system, good rule of law and appropriate regulatory systems in place, and is in close proximity to key growth markets such as China and India but also the Middle East.

These strategic types of investors are all seen as well worth exploring.

Barry brings the conversation back to what they want to achieve by introducing external equity capital. They all agree that it is about restructuring the business, allowing for continued growth while facilitating an exit for some of the current equity holders in the short to medium term, recognising that this may not be achievable in the 18-month timeframe sought by Caroline. He then asks how much capital they thought would allow them to achieve their objectives and also what is realistic to ask for from an external party. They all agree that it is somewhere between \$15 million and \$25 million to make it worth each other's time and effort.

Interestingly, the banker points out that \$15 million would represent a 50:50 split between current and new equity investors, while \$25 million would see the

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new investor having a majority (72.5%) of the business. Maxine is initially concerned about handing over control so quickly but acknowledges that anyone making such a large investment would expect control. Andrew expresses the view that if they found the right type of investor, this party would not exercise that control unless things were going pretty badly anyway. He also suggests that a transaction could be structured in such a way to give appropriate mechanisms to deal with any conflicts and protect both parties should things not work out.

The accountant suggests that they do not get too caught up in structures and governance at this early stage, other than to recognise that there will need to be changes and greater accountability and that, on the whole, this would most likely be a positive for the business. He advises that any structures put in place would need to be simple but accountable to the investors, including a board and possibly an investment committee to oversee property acquisitions. He also indicates that introducing these accountabilities is far less likely to pose a problem for the Everinghams than it is for other more strongly patriarchal family farming businesses he has as clients.

Caroline asks what each thought their family farm business has to offer an equity investor and the key characteristics that might attract an equity partner to them rather than someone else.

She feels their proven ability to manage a business of considerable scale (especially when compared to the district average), strong track record of buying and developing properties to increase productivity, and the industry relationships that Barry has from his time on the Board of a local grower cooperative and a national industry think tank are all valuable.

Barry raises the value-adding component of the business through the direct-to-mill contracts with a local specialist grain company and the lamb feedlotting as having great potential for expansion. Replacing Caroline's skills and passion for the feedlot are seen as a priority.

The banker feels that Andrew's return to the business provides some continuity and reduces the "key man risk" for an external investor should anything happen to Barry and Maxine.

Maxine feels that the record-keeping and detailed financial reporting already in place for the business, with good oversight from their accountant, are likely to be useful in being able to report on historical but also forward projections for the business.

George wants to talk about some of the potential deductions for an investor. He raises the high variability in rainfall in their region and the lack of an irrigated property in their portfolio to give some protection against complete crop failures. Despite concerns around water security and availability, it is agreed to explore the possible acquisition of such a property. Maxine is concerned that an irrigation property would be very different to managing a dryland

property and one of them would need to be sure that they understood what would be required.

Andrew is of the view that geographic diversity should mitigate some of the production risk, but he also acknowledges a need to stay focused on a region they knew and understood, hence his desire to limit any future growth to central and northern NSW. The banker offers that an investor would ultimately need to accept the variability and recognise how good management can alleviate the impact of poor seasons, as the Everinghams had done successfully in recent years.

The accountant suggests that an investor may be more comfortable with a regional focus, preferring to get diversity by investing with other local operators elsewhere in Australia, as part of a larger grains fund. He admits that this type of investment vehicle is not prevalent as yet, but sees this as a way of the future for external investors wanting the best local knowledge and expertise but geographic diversity.

Barry seeks insights into what the likely timeframe for an investor would be, either directly into the family business or through some sort of diversified fund. Andrew and the banker feel five to seven years would be a likely start, but if things were going well, there was nothing to stop this rolling over for at least that time period again.

George then queries how the exit of equity holders, either family members or external equity investors, would be done without upsetting the continuity of the business. In terms of a partial exit, the accountant said this could be done within the existing investor group with other family members or the new equity investor buying available shares of the business from those looking to exit. He indicated that the structure would also need to ensure that the Everinghams could buy out the investor if they wanted to or exchange the investor's equity for new equity from other external parties. An ultimate exit, he described, was to sell up everything and divide the proceeds between the various owners based on their equity holdings. Likely buyers would include a global food company or a specialised funds manager, preferring to invest at this later stage with a more established track record of co-investment rather than investing equity at an early stage alongside the Everingham family.

In bringing the meeting to a close, Barry thanks everyone for the contributions and the insights provided by the two attendees who are external to the family. Andrew is charged with identifying someone to help pull together a formal approach to attracting equity capital. They recognise that they will have to pay for such advice, but it would be worthwhile in securing a longer-term, stable future for the family business to get the right partner involved. Andrew advises that he will utilise his and the banker's networks to identify such an adviser. Maxine and the accountant are to meet to discuss how to commence preparing financial information to be tabled with such an adviser and, in turn, external equity investors. The family has embarked on a new path forward that is daunting yet exciting, as it opens up a wide array of future possibilities.



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## A Matter of Trusts

by Philippa Briglia, Sladen Legal

# Superannuation proceeds trusts

While the framework for a superannuation proceeds trust will typically be set out under the terms of a will, they can also be established after death, increasing their applicability.

Superannuation proceeds trusts (SPTs) can be a great tax-effective option in the estate-planning toolkit. In seeking to demystify SPTs, this article considers the following questions:

- What is an SPT?
- When can an SPT be used?
- What are the advantages of an SPT?
- Can an SPT only be established under the terms of a will?

### To whom can superannuation death benefits be paid?

Superannuation death benefits can only be paid directly to certain recipients. Regulation 6.22(2) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SISR) provides that death benefits may only be cashed in favour of either or both of the member's legal personal representative (ie the executor or administrator of their estate, known as the legal personal representative (LPR)) or one or more of the member's dependants or interdependants.

"Dependant" is defined under s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) to include any child of the person and any spouse of the person. As an inclusive definition, it also includes persons who were financially dependent on the deceased at the time of the deceased's death.

### Superannuation "death tax"

To understand the role and advantages of an SPT, it is necessary to first understand the potential application of superannuation "death tax".

The taxation of superannuation death benefits depends primarily on two things. First, whether the recipient is a death benefits dependant, and second, the form of the death benefit (ie a pension or lump sum). This article focuses on lump sum death benefits.

"Death benefits dependant" is defined under s 302-195 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) to mean:

- the deceased person's spouse or former spouse;
- the deceased person's child if that child is aged less than 18;
- any other person with whom the deceased person had an interdependency relationship just before they died; or
- any other person who was a (financial) dependant of the deceased person just before they died.

Typically, an adult child will not be a "death benefits dependant" of their deceased parent, unless they were financially dependent or in an interdependency relationship.

Where lump sum death benefits are paid directly to non-death benefits dependants, the tax treatment is as follows:

- tax-free component: tax-free;<sup>1</sup>
- taxable component taxed in the fund: included in recipient's assessable income, with a tax offset which ensures a maximum tax rate of 15%,<sup>2</sup> plus Medicare levy; and
- taxable component not taxed in the fund (eg life insurance proceeds): included in the recipient's assessable income, with a tax offset which ensures a maximum tax rate of 30%, plus Medicare levy.

It is this tax of up to 15%/30% (plus Medicare levy) which is commonly referred to as the superannuation "death tax".

The above tax treatment can be contrasted with payment of lump sum death benefits to death benefits dependants, where the entire lump sum is tax-free<sup>3</sup> (ie there is no "death tax").

### "Look-through" tax treatment for benefits paid to estate

The above tax treatment is where the lump sum death benefits are paid directly to the individual recipient. However, as set out above, reg 6.22 SISR also allows for superannuation death benefits to be paid to a member's LPR, being the executor or administrator of the member's estate.

Where superannuation death benefits are paid to the LPR, s 302-10 ITAA97 provides for "look-through" tax treatment to superannuation death benefits paid to a deceased member's estate.

Broadly, this means that any proceeds paid to the estate from which death benefit dependants have benefited or may be expected to benefit:

- are treated as if they had been paid to a death benefits dependant of the deceased; and
- are not included in the assessable income of the estate (s 302-60 ITAA97).

For any death benefits paid to the estate where death benefit dependants do not benefit or may not be expected to benefit, the tax treatment of such proceeds is as set out in Table 1 (ie up to 15%/30% on the taxable component

(taxed or not taxed in the fund), and nil on the tax-free component).

Note that any death benefits paid to an estate do not attract the Medicare levy.

Table 1 summarises the key tax treatment relating to superannuation death benefit payments.

## What is a superannuation proceeds trust?

The term “superannuation proceeds trust” is not defined under legislation. Rather, it is a generic label used to describe a trust established solely to receive superannuation proceeds on the death of a fund member. SPTs are typically established under the terms of the deceased member’s will.

Typically, the beneficiaries of an SPT will be limited to the deceased’s death benefit dependants. Due to the look-through tax treatment described above, the superannuation proceeds paid to the LPR and held on an SPT will be taxed as if they were paid to the death benefit dependants personally (ie they will be tax-free), but with the benefit of a protected trust structure.

In addition to the look-through concessional tax treatment on receipt of the initial capital, a further tax advantage of an SPT is the tax treatment of income on distributions to minor beneficiaries.

## Distributions to minors taxed at adult marginal rates

Section 102AG of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) contains what are referred to as the “excepted trust income provisions”. Where a trust meets the requirements set out under s 102AG(2), the income of the trust will be “excepted trust income”, which effectively means that minor beneficiaries of income distribution will be taxed as adults, rather than the penalty rates for minors.

Relevantly, s 102AG(2) relevant provides that:

“(2) Subject to this section, an amount included in the assessable income of a trust estate is excepted trust income in relation to a beneficiary of the trust estate to the extent to which the amount:

...

(c) is derived by the trustee of the trust estate from the investment of any property transferred to the trustee for the benefit of the beneficiary:

...

(v) directly as the result of the death of a person and out of a provident, benefit, superannuation or retirement fund ...”

Accordingly, where an SPT is established on terms that meet the requirements under s 102AG(2)(c)(v), income distributions to minor beneficiaries from the SPT will be taxed at adult marginal rates.

## SPTs with sole minor beneficiary

A “regular” discretionary testamentary trust (ie a discretionary trust established under the terms of a will) will typically provide for a wide class of potential beneficiaries in order to allow for flexibility of distributions and increased asset protection.

For an SPT, the beneficiaries of the SPT are limited to “death benefits dependants” to ensure the tax-free receipt of the initial death benefits sum. This can result in an SPT with a sole beneficiary.

Where this sole beneficiary is a minor, an SPT can seem like an attractive structure due to the “excepted trust income” provisions allowing for income distributions to the minor beneficiary to be taxed at adult marginal rates. However, this introduces the risk of the sole minor beneficiary calling for the assets of the trust when they reach age 18 under the rule in *Saunders v Vautier*.<sup>4</sup>

Broadly, the rule in *Saunders v Vautier* provides that, if all of the beneficiaries of the trust are of adult age and have legal capacity, the beneficiaries can agree to require the trustee to transfer the legal estate to them and terminate the trust.

Depending on the circumstances, this may not be a concern for the parties. However, in many cases, particularly where the assets of the trust are significant, the parties would prefer to prevent the beneficiary accessing the trust property before, for example, age 25.

In that scenario, the rule in *Saunders v Vautier* could be defeated by imposing certain conditions under the terms of the trust. For example, for the beneficiaries to exercise the rule in *Saunders v Vautier*, they must have a vested and indefeasible interest in the trust property. Accordingly,

**Table 1. Key tax treatment relating to superannuation death benefit payments**

	Lump sums			
	Paid directly to beneficiary		Paid via estate	
	Taxable – taxed element	Taxable – untaxed element	Taxable – taxed element	Taxable – untaxed element
Death benefits dependant	Nil	Nil	Nil	Nil
Non-death benefits dependant	MTR or 17%, whichever is lower	MTR or 32%, whichever is lower	15%	30%

\*MTR: marginal tax rate.

if the terms of the trust make the beneficiaries' interest contingent on a future event, such as reaching a specific age, the beneficiary cannot call for the trust property.

### In what situations could an SPT be used?

SPTs can be used in a number of situations, including:

- where the benefit is to be paid to a beneficiary who does not have legal capacity (eg a minor child, a severely intellectually disabled person, or a person who does not have legal mental capacity);
- where the beneficiary has issues such that the payment to them is inappropriate or not desired (eg they have a drug addiction or are a spendthrift);
- where the beneficiary could be made bankrupt in the future; and
- where there are multiple death benefit dependants and an SPT could be used to collectively benefit them all.

### Can an SPT be established outside the terms of the will?

An SPT can be established outside the terms of the will, subject to the discussion below.

A common issue raised with SPTs established outside the terms of the will (post-death SPT) is the tension between the requirements of the SISR and the "excepted trust income" provisions. That is, under the SISR, superannuation death benefits can only be paid to limited recipients as listed under reg 6.22, and a post-death SPT is not included in that list. This is to be contrasted with an SPT established under the terms of a will, as the member's LPR is a permitted direct recipient of superannuation death benefits.

In addition, s 102AG(2)(c)(v) ITAA36 requires that the death benefits be "transferred to the trustee for the benefit of the beneficiary ... *directly* as the result of the death of a person and out of a provident, benefit, superannuation or retirement fund" (emphasis added).

The combined operation of these provisions has been interpreted by some commentators to mean that:

- a superannuation fund trustee cannot pay superannuation death benefits directly to a post-death SPT; and
- therefore, the "directly" requirement under s 102AG(2)(c)(v) will not be satisfied.

In the author's view, this interpretation is not correct.

Regulation 6.22 SISR does not state that a member's benefits must be "paid to" the list of permitted recipients. Rather, reg 6.22 SISR states that a member's benefits must be cashed "in favour of" the member's LPR or one or more of the member's dependants.

On that basis, provided the beneficiaries of the post-death SPT are limited to the member's dependants, the requirements of reg 6.22 SISR will be met, and the

superannuation death benefits can be cashed in favour of a member's dependants by being paid directly to the trustee of the post-death SPT.

We have seen this in practice with the payment of superannuation death benefits from public offer superannuation funds to minor children.

Consider the following example:

- a member has an interest in a public offer superannuation fund and makes a binding death benefit nomination (BDBN) directing the superannuation fund trustee to pay 100% of their death benefits to their only child;
- the member dies while the child is under 18;
- the superannuation fund trustee resolves to pay 100% of the deceased's death benefits to the child in accordance with the BDBN;
- as the child does not have legal capacity, the death benefits cannot be paid to the child personally;
- instead, the superannuation fund trustee pays the death benefits to the child's surviving parent (the member's former spouse), as the child's guardian, to hold the death benefits on trust for the child, thereby cashing the death benefits "in favour of" the child.

In this scenario, the superannuation death benefits have been cashed "in favour of" the child in accordance with the BDBN, as they cannot be paid to a minor child personally. In doing so, this creates an "accidental post-death SPT".

The surviving parent would then open a new separate bank account for the SPT to receive the superannuation death benefits and keep the benefits and any investments made using the benefits quarantined from other funds and investments.

### Conclusion

SPTs can be a useful and tax-efficient structure for superannuation death benefits, particularly where there are minor children as superannuation beneficiaries. SPTs can form part of both pre-death estate planning and post-death estate administration, provided the relevant legislative requirements are met.

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#### References

- 1 S 302-140 ITAA97.
- 2 S 302-145 ITAA97.
- 3 S 302-60 ITAA97.
- 4 [1841] EWHC J82.



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## Superannuation

by Daniel Butler, CTA, and  
Fraser Stead, DBA Lawyers

# NALI and NALE – ATO finalises NALI ruling: part 4

After several drafts and revised legislation, we now have a finalised ATO ruling on non-arm's length income.

On 24 September 2025, the ATO finalised LCR 2021/2 (the ruling) which clarifies the operation of the non-arm's length income (NALI) provisions in s 295-550 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) in respect of non-arm's length expenditure (NALE) incurred by a self-managed superannuation fund (SMSF).

The ruling finalises a number of important changes in the prior draft version (LCR 2021/2DC). These changes, which are discussed below, take effect from 1 July 2018. This mirrors the retroactive application of the modified NALI provisions (as amended by the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2023*).

For Parts 1 to 3 of this series of articles on NALI, see the "Related articles" heading at the end of this article.

### General overview: specific and general expenses

The ruling broadly explains the differences between a general non-arm's length expense (general NALE) under s 295-550(8) and (9) ITAA97 and a specific non-arm's length expense (specific NALE) under s 295-550(1)(b) and (c) ITAA97.

### Specific NALE

Paragraphs 10 to 11 of the ruling provide the following in respect of specific NALE:

- "10. An amount of ordinary or statutory income will be NALI of a small complying superannuation fund where:
- there is a scheme in which the parties to the scheme were not dealing with each other at arm's length
  - *in gaining or producing the income of the fund in relation to any particular asset or assets of the fund,*

the fund incurs a loss, outgoing or expenditure of an amount, and

- the amount of the loss, outgoing or expenditure is less than the amount that the fund might have been expected to incur had those parties been dealing with each other at arm's length in relation to the scheme.

11. An amount of ordinary or statutory income will also be NALI of a small complying superannuation fund where:

- there is a scheme in which the parties to the scheme were not dealing with each other at arm's length, and
- *in gaining or producing income in relation to any particular asset or assets of the fund,* the fund does not incur a loss, outgoing or expenditure that the fund might have been expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme." (emphasis added)

### General NALE

In respect of general NALE, paras 11A to 11B of the ruling provide:

- "11A. An amount of ordinary or statutory income will be NALI of a small complying superannuation fund where:
- there is a scheme in which the parties to the scheme were not dealing with each other at arm's length
  - *in gaining or producing the income of the fund (but not in gaining or producing the income in relation to any particular asset or assets of the fund)* the fund incurs a loss, outgoing or expenditure of an amount, and
  - the amount of the loss, outgoing or expenditure is less than the amount that the fund might have been expected to incur had those parties been dealing with each other at arm's length in relation to the scheme.
- 11B. An amount of ordinary or statutory income will also be NALI of a small complying superannuation fund where:
- there is a scheme in which the parties to the scheme were not dealing with each other at arm's length, and
  - *in gaining or producing the income (but not in gaining or producing the income in relation to any particular asset or assets of the fund)* the fund does not incur a loss, outgoing or expenditure that the fund might have been expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme." (emphasis added)

## Identifying specific or general NALE

When considering whether the expense relates to a particular asset or assets of the fund, para 17 of the ruling states:

- “17. In identifying whether the small complying superannuation fund has incurred NALI, there must be a sufficient nexus between the [NALE] and the relevant ordinary or statutory income. That is, the expenditure must have been incurred ‘in’ gaining or producing the relevant income (or acquiring the relevant entitlement). Further, to determine whether the income is *in relation to* any particular asset or assets of the fund, there must also be a sufficient nexus between the [NALE] and ordinary or statutory income derived in respect of that asset or assets including the disposal of that asset.”

We summarise the following notable takeaways from the ATO’s views in paras 17A to 21 of the ruling in respect of specific NALE and general NALE:

- NALE does not have to be deductible under s 8-1 ITAA97 for the NALE provisions to apply (see para 17A);
- NALE incurred to acquire an asset (including associated financing costs) will be specific NALE and will have a sufficient nexus to all ordinary or statutory income (including any capital gain on disposal) derived by an SMSF in respect of that particular asset (see para 18);
- in some instances, the NALE will have a sufficient nexus to all of the ordinary income, statutory income, or both, rather than to any particular asset or assets of the fund (ie general NALE) (see para 19 which also provides examples of general NALE);
- where the fund incurs general NALE, the amount of income that is NALI is calculated using the “twice the difference” approach (see para 20);
- where general NALE is actually incurred, the amount of NALI using the “twice the difference” approach is not reduced by the amount actually incurred when calculating the non-arm’s length component under s 295-545 ITAA97 (see para 20A); and
- where NALE is incurred by an SMSF that does not relate to the acquisition of any particular asset that only has a nexus with the fund deriving ordinary or statutory income during a particular income year, and the SMSF subsequently ceases to incur that NALE in a later income year, income derived in the later income year is not NALI provided the SMSF ceases to incur NALE (see para 21).

## Changes to examples

The welcome relief for SMSFs in relation to the new general NALE provisions is demonstrated by the changes to example 2 of the ruling, which concerns a trustee of an SMSF, Mikasa, obtaining non-arm’s length accounting services for nil expenditure. Notably, the prior version of the ruling provided that such NALE resulted in all of the fund’s income for a particular income year being NALI:

- “25. ...The NALE (being the nil amount incurred for the services) has a sufficient nexus with all of the ordinary and statutory income derived by the SMSF for the 2020–21 income year. **As such, all of the SMSF’s income for the 2020–21 income year is NALI.**” (emphasis added)

However, the updated ruling now confirms that this general NALE will be subject to the “twice the difference” (ie 2x multiplier) approach:

- “25. ... The [NALE] (being the nil amount incurred for the services) has a sufficient nexus with all of the ordinary and statutory income derived by the SMSF for the 2020–21 income year. *The [NALE] incurred by the SMSF in acquiring the accounting services (nil amount) is a general expense. As such, for the 2020–21 income year, the amount of NALI as a result of the general expense will be twice the difference between the amount of the expense that might have been expected to be incurred had the parties been dealing at arm’s length and the amount the entity incurred ...*” (emphasis added)

Other relevant examples in the ruling that contain NALE (eg examples 1 to 4, 9, 11 and 12) provide additional clarification as to whether the relevant expenditure is specific or general.

## SMSF staff discount policies

Paragraph 51 of the ruling has been updated in relation to arrangements for staff discount policies (note the italicised text below indicates the new additions to para 51):

- “51. A small complying superannuation fund might enter into arrangements that result in it receiving discounted prices. Such arrangements will still be on arm’s length terms where they are consistent with normal commercial practices, such as an individual acting in their capacity as trustee (or a director of a corporate trustee) being entitled to a discount under a discount policy where the same discount is provided to all employees, partners, shareholders or office holders. *Where this is not the case, or where the trustee (or director of a corporate trustee) of the fund is able to influence the discount policy, this may indicate that the discount policy is not consistent with normal commercial practices.*” (emphasis added)

Unfortunately, no further guidance has been provided in relation to what “influence the discount policy” means. Further, there is no context as to what kind of influence would result in NALI, eg material or sufficient influence. However, we note that:

- influence of a discount policy by a trustee/director; and
- different discounts being provided to all employees, partners, shareholders or office holders,

*may indicate that the policy is not consistent with normal commercial practices, and potentially may not be at arm’s length.*

This provides some extra comfort to firms where SMSF trustees/directors may have some influence over the firm's discount policy; the prior ATO position suggested that any influence would result in NALI.

Firms offering discounts to staff (including employees, directors, partners, office holders and shareholders) should ensure that they have a discount policy in place that is demonstrably consistent with normal commercial practice.

## Resolving the tension between trustee remuneration and NALI

The starting question here is: can the trustee/director be paid remuneration?

Broadly, an SMSF trustee/director is precluded from being remunerated by an SMSF for duties or services performed on behalf of the fund under s 17A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA).

However, an SMSF trustee/director may be remunerated in accordance with s 17B SISA where a trustee/director performs non-trustee services in a capacity other than as an SMSF trustee/director. Remuneration can be paid by an SMSF for non-trustee type services provided the four criteria in s 17B are complied with. Broadly, these criteria are that the trustee/director:

1. performs the duties or services other than in the capacity of trustee/director;
2. is appropriately qualified, and holds all necessary licences, to perform the duties or services;
3. performs the duties or services in the ordinary course of a business, carried on by the trustee/director, of performing similar duties or services for the public; and
4. receives remuneration that is no more favourable than would be expected if the parties were dealing at arm's length in the same circumstances.

Naturally, this created a tension between s 17B and the NALI provisions where a trustee/director performed duties for their SMSF in an individual capacity (ie not as a trustee/director) but did not otherwise satisfy the requirements in s 17B to charge the SMSF for their services.

### Amendments to the ruling

The ruling has been amended to confirm that, where the requirements of s 17B are not met, the NALI provisions will not apply if the trustee/director does not charge the SMSF for their services. Specifically, para 42 of the ruling states:

“42. Given the statutory restrictions that prevent a trustee or director of a corporate trustee from receiving remuneration, paragraphs 295-550(1)(b) and (c) or subsections 295-550(8) and (9) will not be enlivened due to the trustee or director not charging for the services performed in relation to the fund. *Therefore, the [NALE] provision will not apply where:*

- a trustee acting in that capacity, provides services to the fund for no remuneration, or
- *a trustee acting in a capacity other than as trustee, provides services to the fund for no remuneration where the requirements in section 17B of the SISA are not met.*” (emphasis added)

Where the trustee/director does satisfy the requirements to charge the SMSF under s 17B, the NALI provisions might still apply where a lower or nil expenditure is incurred. Specifically, para 43 of the ruling states:

- “43. However, the fund does incur NALE under either paragraph 295-550(1)(b) or (c) or subsection 295-550(8) or (9) when the trustee or director of a corporate trustee operates in another capacity and they can receive remuneration for their service under section 17B of the SISA, but either:
- does not receive any remuneration for those services, or
  - receives remuneration that is less than what parties dealing with each other at arm's length might have been expected to receive.”

### Trustee or individual capacity?

Naturally, it is still necessary, for the purposes of the NALI provisions and s 17B, to determine whether an individual is performing duties and services in an individual or trustee capacity, and whether any remuneration can or should be obtained from an SMSF.

Unfortunately, the considerations outlined in paras 44 to 48 of the ruling regarding whether a person is performing duties in a trustee or individual capacity remain largely unchanged from the prior version of the ruling. However, a new but not very generous example, example 7A, has been added to provide minor clarification on this issue:

“57A. Mina is a trustee of her SMSF of which she is the sole member. She is a chartered accountant and she operates Once Accounting Services as a sole trader. Whilst at the office, Mina receives a phone call on her office phone from her SMSF auditor during her business hours. The call is related to supporting documentation for an investment made by her SMSF required by the SMSF auditor to complete the audit process. After the phone call, Mina sends a follow-up email to the SMSF auditor using her business computer providing the relevant supporting documentation.

57B. Mina performs these activities as trustee of her SMSF and does not charge her SMSF. Although Mina undertakes the activities at her business premises where she operates her accounting business, the use of the business supplied computer and the office telephone is minor and incidental in nature, and would not, of itself, indicate that Mina is acting in any capacity other than as trustee for her SMSF. Accordingly, the [NALE] provisions will not apply.”

## Conclusion

The updated ruling provides some further clarity for SMSF trustees, advisers and auditors in navigating the NALI and NALE provisions. However, considerable grey areas and ambiguity remain, particularly in relation to determining whether a person is performing duties for an SMSF in an individual or trustee capacity. Where relevant, expert advice should be obtained so that the NALI provisions are not enlivened.

## Related articles

For further guidance, refer to the earlier articles in this series:

1. D Butler and F Stead, “NALI and NALE – NALE still needs fixing: part 1”, (2025) 60(1) *Taxation in Australia* 43. Available at [www.taxinstitute.com.au/resources/journals/taxation-inaustralia/2025/july/Superannuation-NALI-and-NALE-NAListill-needs-fixingpart-1](http://www.taxinstitute.com.au/resources/journals/taxation-inaustralia/2025/july/Superannuation-NALI-and-NALE-NAListill-needs-fixingpart-1).
2. D Butler and F Stead, “NALI and NALE – dividend, fixed and non-fixed NALI: part 2”, (2025) 60(2) *Taxation in Australia* 97. Available at [www.taxinstitute.com.au/resources/journals/taxation-in-australia/2025/august/superannuation-nali-and-nale-dividend-fixedand-non-fixed-nali-part-2](http://www.taxinstitute.com.au/resources/journals/taxation-in-australia/2025/august/superannuation-nali-and-nale-dividend-fixedand-non-fixed-nali-part-2).

3. D Butler and F Stead, “NALI and NALE – the new general NALE provisions: part 3”, (2025) 60(3) *Taxation in Australia* 146. Available at [www.taxinstitute.com.au/resources/journals/taxation-in-australia/2025/september/superannuation-nali-and-nale-the-new-general-nale-provisions-part-3](http://www.taxinstitute.com.au/resources/journals/taxation-in-australia/2025/september/superannuation-nali-and-nale-the-new-general-nale-provisions-part-3).

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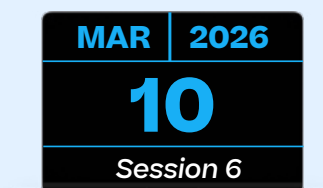
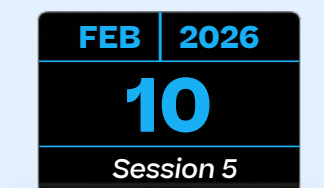
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The following cumulative index is for volume 60, issues (1) to (6). Listed below are the pages for each issue:

Vol 60(1): pages 1 to 52	Vol 60(4): pages 155 to 220
Vol 60(2): pages 53 to 106	Vol 60(5): pages 221 to 290
Vol 60(3): pages 107 to 154	Vol 60(6): pages 291 to 358

<b>15-year exemption</b> small business CGT concessions.....243-245 - restructuring.....310, 313, 314	<b>Assets</b> intangible, tax treatment.....256, 264 SMSFs, valuation.....36, 37	<b>unpaid present entitlements</b> - capital gains for beneficiaries.....143-145 - Div 7A issues.....73-79 varying interpretations.....225	<b>CGT events</b> event A1.....125, 143, 144, 252, 304 event C2.....143, 144, 248 event D1.....143-145, 252, 254 event E1.....88 event E4.....317 event E5.....144 event J2.....315, 317 event J5.....315, 317 event J6.....315, 317 event K3.....205 event K6.....107
<b>50% reduction</b> small business CGT concessions.....243, 244, 310	<b>Auditors</b> SMSFs - compliance.....36, 38 - trustee loss of capacity.....135, 136	<b>Australian Treasury</b> Economic Reform Roundtable.....294	<b>CGT improvement threshold</b> .....53
<b>183-day test</b> .....68	<b>Audits</b> failure to keep records.....114 risks of.....87, 91	<b>B</b>	<b>CGT roll-overs</b> back-to-back.....113 business restructures.....310 family farm restructures.....243, 246, 249
<b>A</b>	<b>Australia</b> double tax agreements – see Double tax agreements whether Bitcoin is money.....125-127	<b>Baby boomers</b> intergenerational wealth transfer....318	<b>Charitable</b> meaning.....200
<b>Accommodation expenses</b> reasonable amounts.....58, 59	<b>Australian Capital Territory</b> powers of attorney, foreign jurisdictions.....46	<b>Bad debts</b> family farm restructuring.....251, 252	<b>Charitable purposes</b> payroll tax exemptions.....200
<b>Administrative errors</b> restitution.....137-141	<b>Australian Charities and Not-for-profits Commission</b> .....194, 201	<b>Bankruptcy</b> farm management deposits.....240	<b>Charities – see also Not-for-profit organisations</b> GST.....299, 300
<b>Administrative penalties – see also Penalties</b> client taxation records.....62 reasonable care, breach.....233	<b>Australian Prudential Regulation Authority</b> superannuation funds.....30, 35, 43, 44	<b>Benchmark interest rate</b> Div 7A.....58	<b>Childcare business</b> default assessments.....301, 302
<b>Administrative Review Tribunal</b> asset betterment assessments.....228, 229 confidentiality orders refused.....1 making decisions without holding a hearing.....298	<b>Australia</b> double tax agreements – see Double tax agreements whether Bitcoin is money.....125-127	<b>Better targeted superannuation concessions</b> \$10m higher tax threshold.....279 calculating earnings.....278 calculation of tax.....278 future realised capital gains.....280 indexing thresholds.....278 timing.....280 unrealised gains.....295 valuation evidence.....280	<b>Children</b> death benefit dependants.....32 superannuation proceeds trusts.....341, 342 trust beneficiaries, powers of court.....40, 41
<b>Ageing population</b> .....46, 56, 294, 299, 318, 326, 330	<b>Australian Securities and Investments Commission</b> SMSF auditor registration.....38	<b>Binding death benefit nominations</b> capacity of member to make.....27, 28 power to renew.....26 providing to all trustees.....28 SMSF trustees, capacity.....134 superannuation.....26-28, 30	<b>Client identification obligations</b> tax practitioners.....6, 7
<b>Aggregated turnover thresholds</b> .....56	<b>Australian Tax system</b> reducing red tape.....227 restitution.....137-141 tax reform - need for.....56, 57, 110 - The Tax Institute recommendations.....158 tax uncertainty, impact of.....224, 225	<b>Bitcoin</b> CGT assets.....125-127 tax treatment.....125, 126 whether Australian currency.....125, 126 whether foreign currency.....127	<b>Client records</b> record-keeping.....62-66
<b>Agreements</b> or contracts, deceased estates.....118-121	<b>Australian Taxation Office</b> administrative errors, restitution.....137-141 CGT event K6.....107 compliance - large corporations.....162 corporate tax residency test.....189, 190 early engagement with.....90, 91 education directions, SMSFs.....227, 228 employee/contractor relationship.....175 GST evasion.....113, 114 non-arm's length expenditure.....147, 148 non-arm's length income - private company dividends.....97, 98 - SMSFs.....344-347 - unit trust investments.....98, 99 practical compliance guidelines.....23, 24 private rulings.....88-90 professional firms.....184 relationship with.....275 scam warning.....6, 7 superannuation - asset valuation guidelines.....37 - financial advice fees.....7 - illegal early access.....34, 35 - SMSF auditors, compliance approach.....36, 38 tax avoidance taskforce.....266 tax governance.....87, 88	<b>Board of Taxation</b> corporate tax residency.....57, 191 Red Tape Reduction Review.....227, 294, 295	<b>Code of Professional Conduct</b> potential breaches.....23 reasonable care concept.....231-233 record-keeping obligations.....62-66 tax agent breaches.....166-169
<b>Agribusinesses – see Family farms; Primary production businesses</b>	<b>Building and construction industry</b> long service leave benefit.....115	<b>Business premises test</b> personal services business.....177, 178	<b>Commercial agreements</b> care in drafting.....264, 266
<b>Agricultural land</b> development, GST liability.....300 foreign ownership in Australia.....329	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Commercial and contractual arrangements</b> characterisation.....258, 260 interpretation.....263 whether a royalty.....260 whether a tax benefit.....263
<b>Alienation of income</b> personal services income.....172, 179, 180	<b>Canadian pension funds</b> farm equity partnerships.....331, 332	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Commissioner of Taxation</b> asset betterment assessments.....228, 229 capital raising, distributions funded by.....227 denying deductions for ATO interest.....161, 162 Div 7A, loan guarantees.....228 education directions, SMSFs.....227, 228 personal services business determination.....178, 179 personal services income guideline.....180-184 settlements with taxpayers.....91 unpaid present entitlements, Div 7A.....73-79, 295
<b>Allocation of profits</b> professional services firms.....184-186	<b>Capacity</b> BDBNs.....27, 28, 134, 135 enduring power of attorney.....46-48, 133-135 loss of, SMSF trustees.....129-136 - documentation requirements.....134, 136 - fund deed.....130, 131 - replacement of trustee.....131-133 - SMSF adviser role.....133-135 - SMSF auditor role.....135, 136 powers of court to vary trusts.....40	<b>Building and construction industry</b> long service leave benefit.....115	<b>Commonwealth Superannuation Scheme</b> .....68
<b>Amended assessments</b> asset betterment.....228, 229 tax evasion, residency.....8, 9, 67-69 tax uncertainty.....20	<b>Capital gains tax</b> Bitcoin.....125-127 pre- or post-CGT assets.....303-306 record-keeping obligations.....62 reform recommendations.....159	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Company tax</b> Productivity Commission recommendations.....113
<b>Announced but unenacted measures</b> superannuation balances above \$3m, 15% tax.....207-209	<b>Capital raising</b> distributions funded by.....227 farm equity partnerships.....326-335	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Compliance – see also Tax compliance</b> ATO resources.....23, 24 education directions, SMSFs.....227, 228 large businesses.....162, 163 privately owned groups, ATO focus.....298, 299
<b>Anti-avoidance provisions</b> Div 7A, payments or repayments.....161	<b>Car benefits</b> FBT - non-monetary benefits.....11-14 - not-for-profit organisations.....196	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Confidentiality</b> tax dispute litigation.....274
<b>Appeals</b> tax dispute litigation.....274-276	<b>Carrying on a business</b> residency definition.....190	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	<b>Consideration</b> concept for royalty purposes.....258, 259, 264, 265
<b>Arm's length</b> definition.....44 price.....260	<b>Cash withdrawals</b> default assessments.....301, 302	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	
<b>Arm's length dealings</b> royalty characterisation.....264, 265	<b>Caution</b> tax agent sanction.....166-169, 229, 230	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	
<b>Assessable income</b> failure to keep records.....114	<b>Central control</b> testamentary trusts (US).....204	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	
<b>Asset betterment assessments</b> .....228, 229	<b>Central management and control</b> corporate tax residency.....189-191	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	
<b>Asset ownership</b> joint tenancy.....323, 324	<b>CGT assets</b> Bitcoin.....125-127 pre- or post-CGT assets.....303-306 unpaid present entitlements.....143, 144	<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	
<b>Asset protection</b> family farms.....238 small business CGT concessions, restructuring.....316 superannuation proceeds trusts.....341 testamentary discretionary trusts, foreign beneficiaries.....204		<b>Business structures – see also Restructuring businesses</b> Div 7A loan issues.....76, 77	

**Consolidated entity disclosure**  
public companies..... 191-193

**Contract**  
or agreement, deceased estates..... 118-121

**Contractors**  
definition of “employee”..... 110, 111  
employee/contractor relationship..... 175  
employment agency provisions..... 225, 296  
not-for-profit organisations..... 199, 200  
or employees ..... 199  
superannuation ..... 199, 200

**Contraventions**  
education directions, SMSFs..... 227, 228

**Contributions**  
statutory long service leave fund..... 115  
superannuation  
- farm management deposits ..... 240  
- overpaid..... 137-139

**Corporate limited partnerships**  
tax residency..... 57

**Corporate tax**  
compliance..... 162, 163  
tax certainty..... 162  
transparency..... 162, 163

**Corporate tax rate**  
reform recommendations..... 158, 159

**Corporate tax residency – see also Residency**  
Australian tax residents..... 189  
central management and control..... 189-191  
consolidated entity disclosure..... 191-193  
foreign-incorporated companies..... 189-193  
tax reform, need for..... 57, 159

**Corporations**  
large business compliance..... 162, 163

**Cost-of-living pressures** ..... 4, 81-83  
Medicare levy reduction, low-income earners..... 296

**Costs orders**..... 270

**Country-by-country reporting**  
multinational companies ..... 163  
public, exemptions ..... 59

**Covid**  
travel restrictions..... 60, 61

**Cross-border transactions**  
testamentary discretionary trusts, foreign beneficiaries..... 204-206

**Cryptocurrency**  
whether Bitcoin is money..... 125-127

**Currency**  
whether Bitcoin is money..... 125-127

**D**

**Death**  
farm management deposits..... 240  
Higher Education Loan Program debts ..... 83  
testamentary trusts, non-resident beneficiaries..... 204, 205

**Death benefits – see Superannuation death benefits**

**Death benefits dependant**  
definition ..... 340

**Deceased estates**  
“double death”..... 113  
main residence CGT exemption  
- land consolidation..... 94, 95  
- multiple units..... 93, 94  
right to occupy dwelling..... 113  
stamp duty..... 118-121  
testamentary discretionary trusts, foreign beneficiaries..... 205

**Deductibility of expenditure**  
financial advice fees ..... 7  
personal services income..... 179, 180  
shortfall interest charge/general interest charge..... 4, 5

**Deemed dividends**  
Div 7A loans..... 75, 76, 78

**Default assessments**  
onus of proof..... 301, 302

**Depreciating assets**  
family farm restructures ..... 242, 246

**Depreciation rules**  
small and medium enterprises..... 161, 295

**Derivation of income**  
income “derived by” and “paid to”..... 257, 260, 265  
statutory long service leave fund..... 115

**Digital currency**  
whether Bitcoin is money..... 125-127

**Directors**  
consolidated entity disclosure obligations ..... 192, 193  
FBT, not-for-profit organisations ..... 198, 199  
non-monetary benefits, FBT..... 11-14, 53  
whether employees ..... 12-14

**Disclosure obligations**  
consolidated entities, directors ..... 192, 193

**Discretionary trusts**  
family farms..... 328  
foreign beneficiaries, estate planning ..... 204-206  
interest in land..... 120  
non-arm’s length income, SMSFs ..... 98  
non-monetary benefits of directors, FBT..... 11-14, 53  
pre- or post-CGT asset..... 303-306  
professional services firms, restructures..... 184  
property settlements ..... 210-212  
specifying trust purpose..... 210  
unpaid present entitlements  
- CGT issues ..... 145  
- Div 7A ..... 53, 57, 295

**Dispute resolution**  
litigation..... 268-276

**Diverted profits tax**  
royalties, intellectual property ..... 163, 164, 256, 257, 261-263, 296

**Dividends**  
family farms..... 240

**Division 7A**  
benchmark interest rate ..... 58  
loan guarantees ..... 228  
loan issues  
- deemed dividends..... 78  
- payments or repayments..... 161  
- preserving objection rights ..... 78  
- structuring implications..... 76, 77  
- sub-trust arrangements..... 78  
- unpaid present entitlements..... 53, 57, 73-79, 295

**Documentation**  
FBT, salary packaging ..... 197  
legal professional privilege..... 115, 116  
s 70-100 election..... 250, 251  
Subdiv 122-A roll-overs..... 247  
trustees, loss of capacity..... 134, 136

**Domestic travel expenses**..... 59

**Domicile test**..... 68

**“Double death”**  
deceased estates..... 113

**Double tax agreements**  
Australia-Ukraine..... 298

**Dutiable property**  
transfer, deceased estates..... 118-121

**Dwelling**  
definition ..... 93, 94

**E**

**Economic Reform Roundtable**..... 294

**Education – see Tax education**

**Education directions**  
SMSFs..... 227, 228

**Embedded royalties**..... 258, 263, 265

**Employee share scheme discounts**  
reportable fringe benefit amount ..... 198

**Employees**  
car benefits, FBT..... 11-14, 196  
definition of “employee”..... 110, 111, 158  
independent contractor or employee..... 175  
not-for-profit organisations, exemptions ..... 200, 201

**Employer obligations**  
not-for-profit organisations..... 194-203  
Payday Super requirements..... 295

**Employment**  
definition of “employee”..... 110, 111  
evidence of ..... 12-14  
independent contractor or employee..... 175, 199

**Employment agency provisions**  
contractors ..... 225, 296

**Employment benefits**  
not-for-profit organisations..... 194-203

**Employment test**  
personal services business ..... 177

**Enduring power of attorney**  
foreign jurisdictions..... 46-48  
SMSF trustees, loss of capacity ..... 133

**Entertainment benefits**  
not-for-profit organisations..... 196, 197

**Entertainment facility leasing benefits**  
not-for-profit organisations..... 195, 196

**Equity**  
tax and superannuation systems, restitution ..... 137-141

**Equity partnerships**  
family farms – see **Farm equity partnerships**

**Errors – see also Mistakes**  
salary packaging..... 197  
tax and superannuation systems, restitution ..... 137-141  
tax professionals..... 2

**Estate planning – see Succession and estate planning**

**Evasion**  
residency, amended assessments..... 8, 9, 67-69

**Evidence**  
characterisation of transactions ..... 20  
employment contract..... 12-14  
tax dispute litigation ..... 269, 270, 274, 276

**F**

**Fair-dealing rule**  
trustee purchase of beneficial interest..... 119

**Fairness**  
tax and superannuation systems, restitution ..... 137-141

**False and misleading statements**  
tax shortfall penalties..... 21

**Family assistance payments** ..... 198  
reportable fringe benefit amount ..... 198

**Family farms**  
equity partnerships  
- ageing population ..... 326  
- Australian agriculture..... 326-331  
- Canadian pension funds..... 332  
- equity capital to fund growth..... 331-334  
- examples..... 334, 335  
- financing..... 329, 330  
- succession ..... 330, 331  
restructuring as corporations..... 238-254  
- CGT concessions ..... 243-245, 249  
- dividends ..... 240  
- farm management deposits ..... 240  
- GST, trading stock transfer..... 251  
- private company operation..... 239, 240  
- rent, farm land held in personal names..... 240  
- roll-over relief, transfer of assets to wholly owned company..... 249-251  
- salary and wages ..... 240  
- shareholder loans ..... 240  
- small business restructure roll-over..... 241-245  
- state duties..... 253, 254  
- tax concessions ..... 239, 244  
- trade debtors/bad debts..... 251, 252  
- unpaid present entitlements..... 252, 253

**Family law**  
definition of “property” ..... 210  
property settlement ..... 210-212

**Family trust distribution tax**  
distributions outside “family groups”..... 295  
non-deductibility of interest..... 161, 162  
tax professionals, risks ..... 2  
The Tax Institute advocacy ..... 292

**Family trusts – see Discretionary trusts**

**Farm equity partnerships**..... 326-331  
ageing population..... 326  
Australian agriculture..... 326-331  
Canadian pension funds ..... 332  
equity capital to fund growth..... 331-334  
examples..... 334, 335  
financing..... 329, 330  
succession..... 330, 331

**Farm management deposits**..... 240, 330

**Farming – see Family farms**

**Federal Budget 2020-21**  
corporate tax residency ..... 191

**Federal Budget 2025-26**..... 296

**Federal Budget 2026-27**..... 296

**Federal election 2025** ..... 294

**Financial accommodation**  
unpaid present entitlements, Div 7A..... 73-75

**Financial advice fees**  
superannuation funds ..... 7

**Fit and proper person**  
tax agent caution..... 166-169

**Fly in fly out work**  
Covid travel restrictions..... 60, 61

**Food and drinks**  
not-for-profit organisations..... 196

**Foreign currency gains and losses provisions**  
Bitcoin, whether foreign currency..... 127

**Foreign-incorporated companies**  
corporate tax residency ..... 189-193

**Foreign ownership**  
agricultural land in Australia ..... 329

**Foreign resident beneficiaries**  
testamentary trusts, estate planning..... 204-206

**Foreign trust surcharge**  
testamentary discretionary trusts, foreign beneficiaries ..... 205

**Franked distributions**  
capital raising to fund ..... 227

**Fraud**  
GST evasion..... 113, 114

**Fraud on a power doctrine** ..... 211

**Fringe benefits tax**  
definition of “employee”..... 110, 111  
discretionary trust, non-monetary benefits..... 11-14  
not-for-profit organisations  
- directors and officeholders..... 198, 199  
- meal entertainment..... 196, 197  
- pooled cars..... 196  
- salary packaging..... 197, 198  
- salary sacrifice..... 195, 196  
reform recommendations..... 158  
reportable fringe benefit amounts..... 196, 198

**Fund-raising events**  
GST ..... 299, 300

**G**

**General anti-avoidance provisions**  
CGT roll-overs..... 113

**General interest charge**  
changes from 1 July 2025..... 4, 5  
non-deductibility ..... 161, 162, 295  
remissions ..... 5  
tax litigation ..... 271

**Genesis block**..... 126

**Genuine mistakes**  
family trust distribution tax..... 2  
tax and superannuation systems, restitution ..... 137-141

**Genuine restructure**  
safe harbour rule ..... 242, 312

**Gift-deductible entities**  
GST ..... 299, 300

**Family law**  
Uber driver payroll tax..... 296

**Giving funds**  
new rules, Australian charities..... 6

**Global value chains**  
profit shifting ..... 162

**Goods and services tax**  
family farms, trading stock transfer..... 251

- fund-raising events.....299, 300  
land development.....300, 301  
record-keeping obligations.....62  
reform recommendations.....159  
refund arrangements.....113, 114  
tax reform, need for.....57
- Goodwill**  
farming businesses.....239, 253
- Guarantees**  
loans, Div 7A.....228
- H**
- Harmonisation**  
need for, definition of  
“employee”.....110, 111, 158
- HECS debts**.....81–85
- Henry review**.....57, 158
- High-risk arrangements**  
SMSF auditors.....38  
tax uncertainty.....22–24
- High wealth groups**  
ATO compliance focus.....298, 299
- Higher education – see Tax education**
- Higher Education Loan Program**  
death.....83  
eligibility.....82  
interest on debt.....83  
overseas travel.....83, 84  
proposed changes.....84  
repayment schedule.....82
- Holistic tax reform**.....56, 57
- Honest mistakes**  
family trust distribution  
tax.....2, 292, 295
- I**
- In connection with retirement**... 313, 314
- In respect of**  
definition.....11–14
- Incapacity**  
SMSF trustees.....129–136  
– documentation  
requirements.....134, 136  
– fund deed.....130, 131  
– replacement.....131–133  
– SMSF adviser role.....133–135  
– SMSF auditor role.....135, 136
- Income “derived by” and  
“paid to”**.....257, 260, 265
- Income tax withholding obligations**  
superannuation death benefits.....32
- Independent contractors**  
employee/contractor  
relationship.....175, 199  
personal services income.....173
- Individuals**  
personal income tax, new tax  
cuts.....296  
proposed \$1,000 instant tax  
deduction.....295, 296  
tax reform recommendations.....159  
tax residency.....67–69
- Instant asset write-off**  
small and medium enterprises.....295  
small businesses.....57, 161, 224, 225  
tax reform recommendations.....159
- Intangible assets**  
tax treatment.....256, 264
- Integrity measures**  
capital raising, distributions  
funded by.....227
- Intellectual property**  
**licensing**.....257–259, 263  
diverted profits tax.....261–263  
royalty for right to  
use.....257, 259, 261, 264, 265  
royalty withholding tax.....163, 164, 296
- Intentional disregard**  
tax shortfall penalties.....21
- Interdependency relationships**  
death benefit dependants.....32
- Interest**  
Higher Education Loan Program  
debts.....83
- Interest charges**  
non-deductibility.....4, 5
- “Interest in land”**  
deceased estates.....120
- Intergenerational equity**.....294
- Intergenerational report**.....56
- Intergenerational wealth transfer**  
failed trust distributions.....321–323  
joint tenancy asset  
ownership.....323, 324  
trust-to-trust distributions.....318, 319  
trust vesting, avoiding.....319–321
- International tax**  
royalty withholding tax or diverted  
profits tax.....296
- Investment**  
farm equity partnerships.....326–335
- J**
- Joint tenancy**  
asset ownership.....323, 324
- L**
- Land consolidation**  
main residence CGT exemption,  
deceased estates.....93–95
- Land development**  
GST liability.....300, 301
- Land tax surcharge**  
testamentary discretionary trusts,  
foreign beneficiaries.....205
- Leases**  
related party arrangements,  
SMSFs.....36
- Legal professional privilege**  
loan agreements.....115, 116
- Legal representatives**  
tax dispute litigation.....275
- Legal tender**  
whether Bitcoin is money.....125–127
- Licences**  
intellectual property.....257–259, 263
- Lifestyle assets**  
ATO focus, privately owned and  
wealthy groups.....298, 299
- Limitation period**  
tax dispute litigation.....271
- Listed securities**  
ATO valuation guidelines.....37
- Litigation**  
tax disputes.....268–276  
uncertain tax positions.....90
- Livestock**  
forced disposal or death.....239  
precluded assets.....246  
transferring.....249, 250
- Loan agreements**.....77, 78  
legal professional privilege.....115, 116
- Loan guarantees**  
Div 7A.....228
- Loans**  
Australian farm sector.....329, 330  
benchmark interest rate.....58  
Div 7A, payments or repayments.....161  
Higher Education Loan  
Program.....81–85  
“in respect of” employment of  
directors.....13  
tax time loans.....59  
unpaid present entitlements,  
Div 7A.....53, 57, 73–79, 295
- “Lock-out” rule**  
small businesses.....295
- Long service leave fund**  
derivation of income.....115
- Loss of capacity – see Incapacity**
- Low-income earners**  
Medicare levy reduction.....296
- Lump sum benefits**  
taxation.....32
- M**
- Main residence CGT exemption**  
deceased estates  
– land consolidation.....94, 95  
– multiple units.....93, 94
- Market value**  
ATO definition.....36  
small business CGT concessions,  
restructuring.....316
- Marriage settlements**  
discretionary trusts.....210–212
- Meal allowances**  
expenses, reasonable  
amounts.....58, 59
- Meal entertainment benefits**  
not-for-profit organisations.....195–197
- Medicare levy**.....340, 341  
reduction, low-income earners.....296  
surcharge, reportable fringe  
benefit amount.....198
- Member Spotlight**  
Annemarie Wilmore.....17  
Eric Lay.....73  
George Hodson.....236  
Kim Reynolds.....124
- Mental incapacity**  
SMSF trustees.....129, 130, 133
- Minors – see also Children**  
superannuation proceeds  
trusts.....341, 342
- Mistakes – see also Errors**  
family trust distribution  
tax.....2, 292, 295  
tax and superannuation systems,  
restitution.....137–141  
tax practitioners.....156
- Mobile phone benefits**  
not-for-profit organisations.....196
- Money**  
Bitcoin, whether legal tender... 125–127
- Motor vehicles**  
non-monetary benefits, FBT.....11–14
- Multinational enterprises**  
country-by-country rules.....163  
engagement with ATO.....90, 91
- N**
- New South Wales**  
powers of attorney, foreign  
jurisdictions.....46
- New Zealand**  
powers of attorney, foreign  
jurisdictions.....46
- Non-arm’s length expenditure**  
SMSFs.....35, 36  
– ATO position.....147, 148  
– lower than arm’s length loss.....146  
– nil expenses.....146, 147  
– non-arm’s length  
income.....344–347
- Non-arm’s length income**  
definition.....35  
SMSFs  
– background.....43, 44  
– disproportionate tax.....43–45  
– fixed and non-fixed trust  
entitlements.....97–99  
– legislative overview.....44  
– non-arm’s length  
expenditure.....344–347  
– private company dividends... 97, 98  
– trustee remuneration.....346
- Non-resident beneficiaries**  
testamentary trusts, estate  
planning.....204–206
- Northern Territory**  
powers of attorney, foreign  
jurisdictions.....46
- Not-for-profit organisations**  
concessions.....195, 196  
contractors.....199, 200  
directors and officeholders.....198, 199  
employer concessions.....194–203  
FBT.....194, 195  
– directors and  
officeholders.....198, 199  
– meal entertainment.....196, 197  
– mobile phone benefits.....196  
– pooled cars.....196  
– salary packaging.....197, 198  
– salary sacrifice.....195, 196  
new giving fund rules.....6  
Payday Super.....201, 202  
payroll tax exemptions.....200, 201  
salary packaging.....197, 198  
salary sacrifice  
arrangements.....195, 196  
superannuation guarantee  
charge.....201, 202
- Notice of assessment**  
deceased estates.....118–121
- O**
- Objections**  
asset betterment  
assessments.....228, 229  
challenging private rulings.....89, 90  
extension of time to lodge.....164
- preserving right to.....78  
tax litigation.....273
- Onus of proof**  
default assessments.....301, 302  
obtaining a tax benefit... 261, 262, 265
- Overseas employment**  
tax residency.....8, 9, 67–69
- Overseas resident beneficiaries**  
testamentary trusts, estate  
planning.....204–206
- Overseas travel**  
Higher Education Loan Program  
debts.....83, 84
- Overtime meal allowances**  
expenses, reasonable  
amounts.....58, 59
- P**
- Pacific Australia Labour Mobility  
scheme**  
residency.....68, 69
- Pacific Labour Scheme**  
residency.....69
- Pareto principle**.....318
- Partnerships**  
trading stock election.....249
- Pay as you go withholding**  
definition of “employee”.....110, 111  
financial advice fees.....7
- Payday Super**  
employer requirements.....295  
not-for-profit  
organisations.....201, 202
- Payroll tax**  
contractor provisions.....225, 296  
definition of “employee”.....110, 111  
exemptions, not-for-profit  
organisations.....200, 201  
Uber drivers.....296
- Penalties – see also Administrative  
penalties**  
client taxation records.....62  
superannuation guarantee  
shortfalls.....202  
tax dispute litigation.....270  
tax shortfalls.....20, 21, 89, 91  
unregistered tax agents.....58
- Penalty assessments**  
asset betterment.....228, 229
- Pension benefits**  
taxation.....32
- Perpetuities**  
rule against.....318, 319
- Personal income tax**  
new tax cuts.....296
- Personal services business**  
business premises test.....177, 178  
definition.....173, 174  
determination.....178, 179  
employment test.....177  
results test.....174–176  
unrelated clients test.....176, 177
- Personal services income**  
alienation.....172, 179, 180  
Commissioner’s guideline.....180–184  
deductions.....179, 180  
independent contractors.....173  
meaning.....172, 173
- Philanthropy**  
new giving fund rules.....6  
payroll tax exemptions.....200
- Pooled cars**  
not-for-profit organisations.....196
- Power of attorney**  
foreign jurisdictions.....46–48  
SMSF trustees, loss of capacity.....133
- Practical compliance guidelines**  
ATO resources.....23, 24  
Pre-CGT assets.....303–306
- Precedent**  
tax dispute litigation.....275
- Primary production businesses**  
family farms restructuring as  
corporations.....238–254, 326  
– CGT concessions.....243–245, 249  
– dividends.....240  
– farm management deposits.....240  
– GST, trading stock transfer.....251  
– private company  
operation.....239, 240

- rent, farm land held in personal names..... 240
- roll-over relief, transfer of assets to wholly owned company..... 249-251
- salary and wages..... 240
- shareholder loans ..... 240
- small business restructure roll-over..... 241-245
- state duties..... 253, 254
- tax concessions ..... 239, 244
- trade debtors/bad debts..... 251, 252
- unpaid present entitlements..... 252, 253
- Principal purpose** obtaining a tax benefit..... 263
- Private companies** Div 7A, loan guarantees..... 228
- family farm restructuring..... 239, 240
- SMSF investments in, non-arm's length income..... 97, 98
- unpaid present entitlements, Div 7A..... 53, 57, 73-79, 295
- Private health insurance rebate** reportable fringe benefit amount.... 198
- Private rulings** ATO, uncertain tax positions ..... 88-90
- Private use of trading stock** goods taken from stock..... 299
- Privately owned groups** ATO compliance focus ..... 298, 299
- Procedure** tax dispute litigation ..... 274
- Productivity Commission** draft recommendations..... 113, 158
- Pillar 1 interim report..... 294
- The Tax Institute submission to ..... 56, 158, 294
- Professional development** tax practitioners..... 156, 157
- Professional services firms** allocation of profits..... 184-186
- risk assessment..... 172, 181-186
- Profit shifting** large businesses ..... 162
- Proper purpose rule** discretionary trust powers..... 211
- Property** family law definition ..... 210
- whether Bitcoin is money..... 125
- Property settlements** discretionary trusts ..... 210-212
- powers of court to vary trusts..... 40, 41
- Public benevolent institutions** salary packaging..... 195
- Public companies** consolidated entity disclosure..... 191-193
- definition of "public company"..... 191
- Public interest** tax agent registration termination.... 7, 8
- tax litigation..... 272
- Public rulings** interaction with private rulings ..... 89
- Public Sector Superannuation Scheme**..... 68
- Q**
- Queensland** powers of attorney, foreign jurisdictions..... 46
- R**
- Ralph report**..... 172, 180
- Rates of tax** corporate tax entities ..... 56
- R&D** tax incentives..... 163
- Real property** ATO valuation guidelines ..... 37
- Reasonable amounts** travel and overtime meal allowances..... 59
- Reasonable care** administrative penalties..... 233
- application of law..... 232, 233
- breach of duty..... 231
- lack of..... 21
- tax practitioners..... 156, 231, 232
- Reasonably arguable positions** tax shortfall penalties..... 21
- tax uncertainty..... 21, 22
- Recklessness** tax shortfall penalties..... 21
- Record-keeping** client records..... 62-66
- failure to keep records ..... 114
- trustees, loss of capacity..... 134, 136
- Records** concept of ..... 63, 64
- Recreational entertainment benefits** not-for-profit organisations..... 195-197
- Red Tape Reduction Review**..... 294, 295
- Registration** SMSF auditors ..... 38
- tax agents ..... 58
- caution..... 166-169, 229, 230
- termination..... 7, 8, 163
- Related party lease arrangements** SMSFs, business real property ..... 36
- Remuneration** SMSF trustees ..... 346
- Rent** farm land held in personal names ..... 240
- Reportable fringe benefit amounts**..... 196, 198
- Reportable tax positions** risk rating ..... 227
- tax uncertainty..... 22, 23
- Reporting obligations** country-by-country, exemptions..... 59
- Research and development tax incentive** tax agent registration, termination..... 163
- Residency – see also Corporate tax residency** amended assessments, evasion ..... 8, 9, 67-69
- Covid travel restrictions..... 60, 61
- definition..... 190
- individuals..... 67-69
- Residency tests** individuals..... 67-69
- Resides test**..... 67, 68
- Restitutory relief** tax and superannuation systems..... 137-141
- Restructuring businesses** family farms – see **Family farms**
- professional services firms ..... 184
- small business CGT concessions..... 308-317
- 15-year exemption..... 313
- future access to..... 316
- genuine restructure..... 312
- in connection with retirement..... 313, 314
- market value..... 316
- reasons against using..... 312
- retirement exemption..... 315
- roll-over or sale..... 309, 310
- summary of concessions..... 310
- superannuation contribution requirement ..... 312
- trading stock..... 312
- Results test** personal services business ..... 174-176
- Retirement** in connection with..... 313, 314
- Retirement exemption** small business CGT concessions..... 243-245
- restructuring..... 310, 315
- Retrospective legislation** tax uncertainty..... 225
- Risk assessment** Div 7A, loan guarantees..... 228
- professional services firms ..... 172, 181-186
- Risks** of audits ..... 87, 91
- tax uncertainty..... 20, 21, 87, 88
- Roll-over relief** business restructuring..... 310-313
- family farms - small business restructures ..... 241-243
- transfer of assets to wholly owned company..... 249-251
- Royalties** embedded ..... 258, 263, 265
- intellectual property, right to use ..... 257, 259, 261, 264, 265, 296
- Royalty withholding tax** intellectual property..... 163, 164, 256-261, 265, 296
- Rule against perpetuities**..... 318, 319
- Rural land** development, GST liability ..... 300
- S**
- Safe harbour rule** genuine restructure..... 242, 312
- Salary or wages** family farms..... 240
- personal services income..... 173, 179
- Salary packaging** not-for-profit organisations..... 197, 198
- Salary sacrifice arrangements** not-for-profit organisations..... 195, 196
- Sanctions** tax agent caution..... 166-169, 229, 230
- tax agents ..... 58
- Scams** ATO warning..... 6, 7
- Scheme** definition ..... 44
- Seasonal Worker Program** residency ..... 68
- Self-dealing rule** trust property ..... 119
- Self-managed superannuation funds** assets, valuation ..... 36, 37
- auditor compliance ..... 36, 38
- BDBNs ..... 26-28, 30, 134, 135
- contraventions, education directions for..... 227, 228
- illegal early access..... 34, 35
- non-arm's length expenditure..... 35, 36
- ATO position..... 147, 148
- lower than arm's length loss..... 146
- nil expenses..... 146, 147
- non-arm's length income - background ..... 43, 44
- disproportionate tax ..... 43-45
- fixed and non-fixed entitlement..... 97-99
- legislative overview..... 44
- non-arm's length expenditure ..... 344-347
- private company dividends..... 97, 98
- staff discount policies ..... 345, 346
- trustee remuneration ..... 346
- structural review after member's death..... 29
- superannuation rule changes..... 34-39, 207-209
- trustees - loss of capacity ..... 129-136
- remuneration..... 346
- Shareholder loans** family farms..... 240
- Shortfall interest charge** changes from 1 July 2025..... 4, 5
- non-deductibility..... 161, 162, 295
- Shortfall penalties**..... 20, 21, 89, 91
- Significant economic connection** corporate tax residency ..... 191
- Simplified depreciation rules** small and medium enterprises..... 161, 295
- Single touch payroll** reportable fringe benefit amounts..... 198
- Small and medium enterprises** instant asset write-off ..... 295
- Small business 50% reduction** business restructuring..... 310
- Small business CGT concessions** business restructuring - 15-year exemption..... 313
- future access to..... 316
- genuine restructure..... 312
- in connection with retirement..... 313, 314
- market value..... 316
- reasons against using..... 312
- retirement exemption..... 315
- roll-over or sale..... 309, 310
- summary of concessions..... 310
- superannuation contribution requirement ..... 312
- trading stock..... 312
- transfer of assets to wholly owned company..... 249-251
- tax uncertainty..... 21, 22
- trade debtors/bad debts..... 251, 252
- unpaid present entitlements..... 252, 253
- roll-over or sale..... 309, 310
- summary of concessions..... 310
- superannuation contribution requirement ..... 312
- tax uncertainty..... 224, 225
- Small business instant asset write-off** amendments ..... 161
- extension..... 295
- tax reform, need for..... 57, 159
- tax uncertainty..... 224, 225
- Small business roll-overs – see Roll-over relief**
- Small Business Super Clearing House** closure..... 202
- Small businesses** simplified depreciation rules.... 161, 295
- tax reform recommendations ..... 159
- SMSFs – see Self-managed superannuation funds**
- Software royalties**..... 264
- South Australia** powers of attorney, foreign jurisdictions ..... 46
- Spouses** death benefit dependants ..... 32
- Stamp duty** deceased estates..... 118-121
- Statutory long service leave fund** derivation of income..... 115
- Stay applications** tax agent registration termination ..... 7, 8
- Student loans** HECS debts..... 81-85
- Sub-trust arrangements** unpaid present entitlements, Div 7A..... 78
- Subcontractors** long service leave benefit..... 115
- Subdivision of land** land development, GST ..... 300, 301
- Succession and estate planning** family farms..... 238, 241, 243, 244, 250
- equity partnerships ..... 330, 331
- intergenerational wealth transfer - failed trust distributions... 321-323
- joint tenancy asset ownership ..... 323, 324
- trust-to-trust distributions..... 318, 319
- trust vesting, avoiding..... 319-321
- marital property..... 210-212
- notional estate rules..... 28
- powers of attorney, foreign jurisdictions..... 46-48
- SMSF trustees, loss of capacity..... 134, 135
- specifying trust purpose..... 210
- superannuation issues..... 26-33
- BDBNs..... 26-28, 30, 134, 135
- testamentary discretionary trusts, foreign beneficiaries..... 204-206
- Superannuation – see also Self-managed superannuation funds** balances above \$3m - 15% tax ..... 34-39, 207-209
- major changes to Div 296 tax..... 295
- BDBNs..... 26-28, 30, 134, 135
- better targeted superannuation concessions - \$10m higher tax threshold..... 279
- calculating earnings..... 278
- calculation of tax..... 278
- future realised capital gains..... 280
- indexing thresholds ..... 278
- timing ..... 280
- unrealised gains..... 295
- valuation evidence..... 280
- contractors ..... 199, 200
- illegal early access..... 34, 35
- non-arm's length income, definition ..... 35
- Payday Super - employer requirements ..... 295
- not-for-profit organisations..... 201, 202
- reform recommendations..... 159
- restitution, overpaid contributions..... 137-139

- small business CGT  
 concessions ..... 310, 311  
 – retirement exemption ..... 312  
 SMSF rule changes ..... 34–39, 207–209  
 succession and estate  
 planning ..... 26–33  
 – SMSF trustees, loss of  
 capacity ..... 134, 135  
 unjust enrichment ..... 140, 141  
 unrealised gains ..... 278, 292, 295
- Superannuation contributions**  
 CGT concession stakeholders ..... 315  
 farm management deposits ..... 240
- Superannuation death benefits**  
 death bed withdrawals ..... 31  
 dependants ..... 32  
 income tax withholding ..... 32  
 notional estate rules ..... 28  
 superannuation ..... 26–33  
 superannuation proceeds trusts ..... 340
- Superannuation funds**  
 financial advice fees ..... 7
- Superannuation guarantee**  
 definition of “employee” ..... 110, 111
- Superannuation guarantee charge**  
 not-for-profit organisations ..... 201, 202
- Superannuation proceeds trusts**  
 death benefits ..... 340  
 “death tax” ..... 340  
 “look-through” tax  
 treatment ..... 340, 341  
 outside terms of a will ..... 342  
 sole minor beneficiary ..... 341, 342
- Superannuation test** ..... 68
- SuperStream**  
 not-for-profit organisations ..... 202
- T**
- Tasmania**  
 powers of attorney, foreign  
 jurisdictions ..... 46
- Tax administration**  
 restitution for errors ..... 137–141
- Tax advisers**  
 assisting clients with tax  
 uncertainty ..... 19–24, 87–92  
 role in tax governance ..... 87, 88
- Tax agent registration**  
 caution to fit and proper  
 person ..... 166–169, 229, 230  
 sanctions rules ..... 58  
 termination ..... 163  
 – stay of decisions ..... 7, 8
- Tax agents**  
 lack of disclosure by clients ..... 229  
 record-keeping obligations ..... 62–66  
 sanctions and  
 registration ..... 58, 166–169, 229, 230
- Tax benefit**  
 obtaining, onus of proof ..... 261, 262  
 Pt IVA schemes ..... 261–263, 265
- Tax compliance**  
 ATO resources ..... 23, 24  
 large businesses ..... 162, 163  
 reducing red tape ..... 227, 294, 295
- Tax concessions** – see also **Small  
 business CGT concessions**  
 not-for-profit organisations ..... 195, 196
- Tax disputes**  
 litigation  
 – alternative dispute  
 resolution ..... 271, 272  
 – appeals ..... 274–276  
 – confidentiality ..... 274  
 – evidence ..... 269, 270, 274, 276  
 – general interest charge ..... 271  
 – legal costs ..... 270, 276  
 – legal representatives ..... 275  
 – penalties ..... 270  
 – precedent ..... 275  
 – procedure ..... 274  
 – timing issues ..... 271, 274
- Tax education**  
 ATL004 CTA2B Advanced Dux Award  
 – Ryan Attard ..... 307  
 ATL009 Corporate Dux Tax Award,  
 study period 3, 2024  
 – Sherry Cummins ..... 70  
 ATL009 Corporate Tax Dux Award,  
 study period 2, 2024  
 – Clara Tio ..... 15
- CPD events ..... 156, 157  
 CTA1 and CTA2A Dux Awards  
 – Lloyd Miller ..... 170  
 CTA1 Foundations Dux Award,  
 study period 3, 2024  
 – Emily Greer ..... 122  
 CTA2B Advanced, Tax for Trusts  
 and CTA3 Advisory Dux Awards  
 – Carrie Tan ..... 234
- Tax evasion**  
 GST ..... 113, 114  
 residency, amended  
 assessments ..... 8, 9, 67–69
- Tax liabilities**  
 general interest charge ..... 271  
 self-assessment ..... 4, 5  
 vulnerable persons ..... 17
- Tax Ombudsman**  
 work plan ..... 58
- Tax practitioners**  
 ATO scam warning ..... 6, 7  
 family trust distribution tax, risks ..... 2  
 professional development ..... 156, 157  
 reasonable care ..... 156, 231–233  
 record-keeping obligations ..... 62–66  
 tax time loans ..... 59  
 upskilling ..... 156
- Tax Practitioners Board**  
 appeal pending ..... 229, 230  
 client identification obligation ..... 6, 7  
 confidentiality orders ..... 1  
 information sheet ..... 63  
 tax agent registration  
 termination ..... 7, 8  
 tax time loans ..... 59
- Tax reform**  
 Art of Tax Reform Summit ..... 294  
 family trust distribution tax ..... 2  
 need for ..... 56, 110  
 Productivity Commission  
 recommendations ..... 113, 158  
 Roundtable discussions ..... 158  
 The Tax Institute  
 recommendations ..... 158, 159, 292, 294
- Tax refunds**  
 GST evasion ..... 113, 114
- Tax residency** – see also **Corporate  
 tax residency**  
 amended assessments,  
 evasion ..... 8, 9, 67–69  
 Covid travel restrictions ..... 60, 61  
 individuals ..... 67–69
- Tax returns**  
 failure to keep records ..... 114  
 long service leave benefit ..... 115
- Tax schemes**  
 tax shortfall penalties ..... 21
- Tax shortfall penalties** ..... 20, 21, 89, 91
- Tax time loans**  
 tax practitioners ..... 59
- Tax treaties** – see **Double tax  
 agreements**
- Tax uncertainty**  
 amended assessments ..... 20  
 assessing uncertainty ..... 21–24  
 ATO  
 – early engagement with ..... 90, 91  
 – private rulings ..... 88–90  
 causes ..... 224, 225  
 Div 7A ..... 57  
 factors giving rise to ..... 19, 20  
 high-risk arrangements ..... 22–24  
 large corporations ..... 162  
 litigation ..... 90  
 need for reform ..... 56, 57  
 reasonably arguable positions ..... 21, 22  
 reportable tax positions ..... 22, 23  
 retrospective legislation ..... 225  
 risks ..... 20, 21, 88, 89  
 superannuation balances above  
 \$3m, 15% tax ..... 207–209  
 tax adviser roles  
 – assisting clients ..... 19–24, 87–92  
 – tax governance ..... 87, 88
- Taxpayer alerts**  
 tax uncertainty ..... 23
- Technology royalties** ..... 264
- Testamentary discretionary trusts**  
 cross-border transactions ..... 204–206  
 foreign beneficiaries, estate  
 planning ..... 204–206
- Testamentary trusts**  
 deceased estates ..... 118–121
- The Tax Institute**  
 advocacy ..... 222, 292  
 Case for Change ..... 56, 111  
 Community Achievement  
 Awards ..... 108, 109  
 CPD events ..... 157  
 CPD requirements ..... 156  
 family trust distribution tax ..... 292  
 Incoming Government Brief ..... 2, 56  
 local engagement ..... 223  
 new governance structure ..... 3  
 professional development ..... 156, 157  
 submissions to  
 – Board of Taxation ..... 295  
 – NSW Legislative Council ..... 296  
 – Productivity Commission ..... 56, 158  
 Tax Academy ..... 293  
 tax reform  
 recommendations ..... 158, 159, 292  
 technology upgrades ..... 223  
 The Tax Summit  
 2025 ..... 54, 55, 108, 109  
 volunteers ..... 222
- Timing issues**  
 better targeted superannuation  
 concessions ..... 280  
 objections, extension of time to  
 lodge ..... 164  
 tax dispute litigation ..... 271, 274, 276  
 tax uncertainty ..... 20
- Total superannuation balance**  
 above \$3m  
 – major changes to Div 296  
 tax ..... 295  
 – new tax on  
 earnings ..... 34–39, 207–209
- Trade debtors**  
 family farm restructuring ..... 251, 252
- Trading stock**  
 private use, value ..... 299  
 transfer  
 – as part of business  
 restructure ..... 245, 312  
 – disposal “outside the ordinary  
 course of business” ..... 249  
 – election for reconstitution of  
 partnerships ..... 249  
 – precluded assets ..... 246  
 – small business restructure  
 roll-over ..... 241
- Transfer duty**  
 characterisation of transaction ..... 260
- Transparency**  
 large corporations ..... 162, 163
- Travel expenses**  
 reasonable amounts ..... 58, 59
- Travel restrictions**  
 Covid, residency ..... 60, 61
- Travelling overseas**  
 Higher Education Loan Program  
 debts ..... 83, 84
- Trust beneficiaries**  
 non-residents, estate  
 planning ..... 204–206
- Trust distributions**  
 intergenerational wealth transfer  
 – failed distributions ..... 321–323  
 – trust-to-trust  
 distributions ..... 318, 319
- Trust-to-trust distributions**  
 intergenerational wealth  
 transfer ..... 318, 319
- Trust vesting**  
 avoiding ..... 319–321
- Trustees**  
 obligations ..... 40  
 powers of court to vary  
 trusts ..... 40, 41  
 SMSFs, structural review ..... 29
- Trusts**  
 corporate beneficiaries  
 – Div 7A loans ..... 73–75  
 – unpaid present entitlements,  
 CGT ..... 143–145  
 family trust distribution tax ..... 2  
 powers of court to vary ..... 40, 41
- Turnover threshold**  
 tax reform recommendations ..... 159
- U**
- Uber drivers**  
 payroll tax ..... 296
- Ukraine**  
 Australia–Ukraine DTA ..... 298
- Uncertain tax positions** – see **Tax  
 uncertainty**
- Unit trusts**  
 ATO  
 – non-arm’s length income ..... 98, 99  
 – valuation guidelines ..... 37
- United Kingdom**  
 testamentary trust beneficiaries,  
 estate planning ..... 204
- United States**  
 testamentary trust beneficiaries,  
 estate planning ..... 204
- Unlisted securities**  
 ATO valuation guidelines ..... 37
- Unpaid present entitlements**  
 capital gains issues  
 – corporate beneficiaries ..... 143–145  
 – release, waiver or  
 assignment ..... 143  
 – whether CGT assets ..... 143, 144  
 Commissioner’s appeal ..... 295  
 Div 7A loan issues ..... 53, 57, 73–79, 295  
 family farm restructuring ..... 252, 253
- Unpaid tax**  
 non-deductibility of interest ..... 161, 162
- Unrealised gains**  
 superannuation ..... 295  
 superannuation earnings ..... 278, 292
- Unrelated clients test**  
 personal services business ..... 176–178
- V**
- Valuation**  
 SMSF assets ..... 36, 37
- Vesting dates**  
 trusts ..... 318–320
- Victoria**  
 powers of attorney, foreign  
 jurisdictions ..... 46
- Voluntary disclosures**  
 engagement with ATO ..... 91
- W**
- Wait and see rule** ..... 318, 319, 322
- Wealthy groups**  
 ATO compliance focus ..... 298, 299
- Western Australia**  
 powers of attorney, foreign  
 jurisdictions ..... 47, 48
- Wills**  
 Pareto principle ..... 318  
 stamp duty issues ..... 118–121
- Withholding tax**  
 income tax, death benefits ..... 32  
 PAYG, financial advice fees ..... 7  
 royalties, intellectual property ..... 163,  
 164, 257–261, 265, 296
- Work-related expenses**  
 proposed \$1,000 instant tax  
 deduction ..... 295, 296
- Legislation**
- A New Tax System (Goods and  
 Services Tax) Act 1999** ..... 126, 127, 251  
 Pt IVC ..... 164  
 s 40–160 ..... 299  
 s 40–165(1) ..... 299  
 s 40–165(1)(c) ..... 299  
 s 40–165(4) ..... 299
- A New Tax System (Tax  
 Administration) Bill (No. 2) 2000** ..... 24
- Administrative Appeals Tribunal  
 Act 1975**  
 s 41(2) ..... 7
- Administrative Decisions (Judicial  
 Review) Act 1977** ..... 5, 273  
 s 3(1) ..... 277  
 s 5(1) ..... 277  
 Sch 1 ..... 273
- Administrative Review Tribunal  
 Act 2024**  
 s 19 ..... 276, 277  
 s 20(2) ..... 277  
 s 32(2) ..... 7  
 s 49 ..... 277  
 s 52 ..... 277

s 54	277	s 104	47, 48	s 177C(1)(bc)	261-263	s 86-20	179
s 172	230, 306	s 104A	47, 48	s 177C(1)(g)	263	s 86-30	179
s 174(1)	277	s 104A(2)	47	s 177C(2)(a)	250	s 86-60	180
s 174(2)	277	s 105	48	s 177CB	265	s 87-5	173
<b>Administrative Review Tribunal and Other Legislation Amendment Bill 2025</b>	298	<b>Higher Education Support Act 2003</b>	81	s 177CB(3)	261, 263	s 87-15	187
<b>Administrative Review Tribunal Bill 2024</b>	277	Pt 4-2	81	s 177CB(4)(a)(i)	265	s 87-15(4)	178
<b>Australian Apprenticeship Support Loans Act 2014</b>	85	s 3-1	81	s 177J	163, 164	s 87-18(1)	187
s 47A	85	s 36-10(2)	85	s 177J(1)(a)	261	s 87-18(2)	187
<b>Australian Charities and Not-for-profits Commission Act 2012</b>	191	s 87-1	81	s 177J(2)	261, 263	s 87-18(3)	174, 187
<b>Code of Federal Regulations (US) 26 CFR (2025)</b>	206	s 96-1	81	s 260	172, 180	s 87-18(4)	187
- § 301.7701-7	206	s 137-20	83	s 262A	62	s 87-20	178
<b>Commonwealth of Australia Constitution Act</b>	273	s 140-5	85	s 273	43, 97-99	s 87-20(1)	187
s 75(v)	273	s 148-3	85	s 273(2)(a) to (f)	98	s 87-20(1)(a)	176
<b>Construction Industry Long Service Leave Act 1983 (Vic)</b>	115	s 154-18	83	Sch 2F	99	s 87-20(1)(b)	176
<b>Conveyancing Act 1919 (NSW)</b>	121	<b>Income Tax Act 2007 (UK)</b>	206	- s 272-60(1)(a)	313	s 87-25(1)	187
s 24	121	s 475	206	<b>ITAA97</b>	62	s 87-25(2)	187
s 66G(1)	324	s 476	206	Pt 3-1	20, 143, 144, 303, 305	s 87-25(2)(a)(i)	177
<b>Corporations Act</b>	180, 191, 209, 323	<b>Income Tax Assessment (1997 Act) Regulations 2021</b>	32	Pt 3-3	303	s 87-25(3)	187
2001	180, 191, 209, 323	reg 302-200.01	32	Pt 3-30	43	s 87-30(1)	187
s 201D	136	reg 302-200.02	32	Div 40	246	s 87-30(2)	187
s 201F	131	<b>Income Tax Rates Act 1986</b>	43	Div 84	172	s 87-60	187
s 201F(2)	130	<b>Income Tax (Transitional Provisions) Act 1997</b>	295	Div 84 to Div 87	172	s 87-65(1)	187
s 295(3A)	191, 192	s 328-180	295	Div 85	173, 179	s 104-10	304
s 295(3A)(a)	192	s 328-181	254	Div 86	173, 179	s 104-25	145
s 766B	7	<b>Internal Revenue Code (US) 26 IRC § 678 (1986)</b>	204	Div 87	173	s 104-35	145
s 1070A(3)(a)	325	26 IRC § 678 (1986)	206	Div 121	62	s 104-75(1)	145
<b>Crimes Act 1958 (Vic)</b>	125	<b>ITAA36</b>	309-312	Div 122	249, 310, 312	s 104-215	206
s 71	125	Pt III		Div 128	113, 205	s 106-50	145
<b>Disability Services Act 1986</b>	31	- Div 6	205	Div 149	304, 306	s 108-5	125, 127, 143, 254
s 8(1)	33	- Div 7	225	Div 152	241, 243-245, 249, 309-312	s 108-5(1)	95, 254
<b>Duties Act 1997 (NSW)</b>	118	- Div 7A	53, 57, 58, 73-79, 143, 159, 161, 186, 225, 228, 239-241, 247, 251, 295, 320	Div 152-C	314	s 108-5(2)(a)	95
Ch 4		- Div 8	225	Div 296	278, 280	s 108-7	325
- Pt 3	120	Pt IIIA	303	Div 392	254	s 110-25	252
s 8	119	Pt IVA	20, 89, 113, 161, 172, 180, 181, 183-187, 250, 256, 257, 261-263, 265, 271, 275	Div 615	310	s 110-25(2)	145, 254
s 8(1)(a)	118	Div 152	238	Div 775	127	s 112-20	45
s 8(1)(b)	118	Subdiv EA	74, 79	Subdiv 86-B	180	s 112-20(1)(a)(i)	145
s 8(1)(b)(i)	119, 120	s 6(1)	67, 191, 193, 258, 259	Subdiv 118-B	93, 95	s 112-20(1)(a)(ii)	145
s 8(1)(b)(iii)	119-121	s 23AH	191	Subdiv 122-A	238, 241, 245, 247, 249, 311, 312	s 112-20(3)	252
s 8(1)(b)(ix)	118-120	s 44	240	Subdiv 122-B	238, 245, 246, 312	s 112-25	94, 95
s 147	120	s 47	248	Subdiv 124-M	310	s 112-25(4)	94, 95
s 158	120	s 95(2)	206	Subdiv 124-N	244, 245, 310, 312	s 115-215	79
s 158A	120	s 97	144	Subdiv 149-B	305	s 116-20(1)	145
s 159	120	s 97 to 99A	204	Subdiv 152-A	243, 309	s 116-30	315
<b>Evidence Act 1995</b>	274	s 98(3)	206	Subdiv 152-B	243, 244, 309, 310	s 116-30(1)	145
<b>Fair Work Act 2009</b>	110	s 99B	204, 206	Subdiv 152-C	243, 244, 309, 310	s 116-30(2C)	45
s 15AA	111	s 100A	78, 79	Subdiv 152-D	243, 244, 309, 310	s 118-20	144, 145
s 15AA(1)	111	s 102AG	341	Subdiv 152-E	243, 244, 309, 310	s 118-20(1A)	145
s 15AA(2)	111	s 102AG(2)	341	Subdiv 302-B	33	s 118-115	93, 95
<b>Family Law Act 1975</b>	30	s 102AG(2)(c)(v)	341, 342	Subdiv 302-C	33	s 118-120	95
s 4	210	s 109C	79	Subdiv 328-D	246, 247	s 118-120(5)	95
s 79	210-212	s 109C(4)	251	Subdiv 328-F	238, 241-245, 249, 310-312	s 118-120(6)	95
s 79(1)(d)	212	s 109CA	79	Subdiv 385-F	239	s 118-130	95
s 79(4)	212	s 109D	75, 79, 143	Subdiv 385-G	239	s 118-195	93, 113
<b>Family Trust Distribution Tax (Primary Liability) Act 1998</b>	295	s 109D(1)	58, 75	Subdiv 768-G	191	s 118-200	93
<b>Federal Court of Australia Act 1976</b>	277	s 109D(3)	74, 75, 79, 247	Subdiv 815-E	59	s 118-205	93
s 20(2)	277	s 109D(3)(b)	79	Subdiv 900-B	58	s 122-15	245
s 21	273	s 109D(3)(d)	79	s 4-5	85	s 122-20(1)	245
s 24	274	s 109E(5)	58	s 6-5	19, 20, 89	s 122-20(3)	245
s 37AG	277	s 109F	75, 79	s 8-1	19, 89, 179, 345	s 122-25(1)	245, 246, 254
s 43(1)	277	s 109G(3)	75	s 25-5	4, 180	s 122-25(2)	254
<b>Federal Court Rules 2011</b>	277	s 109K	254	s 25-5(1)	4, 161	s 122-25(3)	245
r 1.39	277	s 109N	228	s 25-35	254	s 122-25(5)	245
r 36.03(a)	277	s 109N(1)(b)	58	s 26-5	4	s 122-25(6)	245
<b>Fringe Benefits Tax Assessment Act 1986</b>	180	s 109R	79, 161	s 26-5(1)(a)	4	s 122-25(7)	245
Pt XII	14	s 109S	254	s 26-5(1A)	161	s 122-35	246
s 41	195, 197	s 109T	161	s 40-285	246	s 122-37	246
s 57A	195	s 109U	228	s 40-340	245, 247, 251, 312	s 122-37(3)	246
s 58P	197	s 109U(1)(a)	228	s 40-340(1)	246, 247	s 122-40(1)	254
s 132	66	s 109U(1)(c)	228	s 40-340(2)(b)	246	s 122-45	254
s 136(1)	11, 13, 198	s 109UB	73, 74	s 40-340(3)	250	s 122-45(1)	254
s 137(1)	13	s 109W	161	s 40-345	246	s 122-50	254
s 137(1)(a)	13	s 109W(3)	161	s 70-10	254	s 122-55	254
s 137(1)(b)	13	s 109XA	79	s 70-10(1)(b)	246	s 122-60	254
s 137(1)(c)(i)	13	s 109XA(1)	79	s 70-90	245, 246, 251, 254, 311, 312	s 122-70	248
s 137(1)(d)	13	s 109XA(2)	79	s 70-95	254	s 122-70(3)	248
s 138B	14	s 109XA(3)	79	s 70-100	238, 245, 249-251, 254, 312	s 122-70(3)	248
<b>Guardianship and Administration Act 1990 (WA)</b>	48	s 109XB	58	s 70-100(4)	251, 254	s 149-15(4)	305
Pt 9	47	s 128B(2B)	163, 164	s 84-5	173, 187	s 149-15(5)	305
s 102	48	s 160L	306	s 85-5	187	s 149-20(2)	306
		s 160ZH(12)	94	s 85-10	187	s 149-30(1)	305
		s 160ZH(13)	94	s 85-10 to 85-25	180	s 149-30(2)	305, 306
		s 160ZH(14)	94	s 85-15	187	s 152-10(1)(a)	243, 309
		s 167	114	s 85-20	187	s 152-10(1)(b)	243, 309
		s 170	8	s 85-25	187	s 152-10(1)(c)	243, 309
		s 170(10AA)	254	s 85-30	187	s 152-10(1)(d)	243, 309
				s 85-35	187	s 152-10(2)	243, 309, 316, 317
				s 86-5(2)	179, 187	s 152-105	313
				s 86-15	179	s 152-110	313
						s 152-110(1)(d)	313
						s 152-125	314
						s 152-125(2)	314
						s 152-125(3)	314
						s 152-305(2)(b)	315

§ 152-310	315	<b>Powers of Attorney Act 2006 (ACT)</b>	48	<b>Tax Laws Amendment (2004 Measures No. 1) Act 2004</b>	79	<b>Trustee Act 1958 (Vic)</b>	40
§ 152-315(5)	315	§ 89	48	<b>Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016</b>	242	§ 63A	40, 41
§ 152-320	315	<b>Powers of Attorney Act 2014 (Vic)</b>	48	<b>Taxation Administration Act 1953</b>	233	§ 63A(1)(d)	40
§ 152-325(1)	315	§ 138	48	Pt IIA	4	<b>Trustees Act 1962 (WA)</b>	41
§ 152-325(1)(a)	317	<b>Powers of Attorney and Agency Act 1984 (SA)</b>	48	Pt IVC	89, 268–270, 273, 274	§ 90	41
§ 152-325(2)	313	§ 14	48	§ 3DB(5)	59	<b>Trusts Act 1973 (Qld)</b>	132
§ 152-325(3)	315	§ 14(4)	48	§ 3DB(6)	59	§ 5	136
§ 152-325(4)	315	<b>Powers of Attorney Regulations 2024 (NSW)</b>		§ 14ZL	277	§ 12	136
§ 152-325(5)	315	§ 5	48	§ 14ZQ	277	<b>Universities Accord (Student Support and Other Measures) Bill 2024</b>	85
§ 152-325(7)	315	Sch 2	48	§ 14ZS	5	<b>Variation of Trusts Act 1958 (UK)</b>	40
§ 152-325(8)	315	<b>Property Law Act 1974 (Qld)</b>	320	§ 14ZY	277	<b>VET Student Loans Act 2016</b>	
§ 207-159	227	§ 210	324	§ 14ZZ(1)	277	§ 23EC	85
§ 290-150(4)(b)	315	<b>Property Law Act 2023 (Qld)</b>		§ 14ZC(1)	276	<b>Rulings and other materials</b>	
§ 290-550(3)(a)	98	§ 201	324	§ 14ZE	277	<b>Accounting Professional and Ethical Standards Board</b>	
§ 290-550(3)(a) to (f)	98	§ 203	324	§ 14ZZK	66	APES 110	39, 233
§ 291-20	254	<b>Student Loans (Overseas Debtors Repayment Levy) Act 2015</b>	83	§ 14ZZN	276	APES 220	65, 233
§ 291-265	141	§ 5	85	§ 14ZZO	276	APES 320	65
§ 292-100	243, 311, 314	<b>Superannuation Guarantee (Administration) Act 1992</b>		Sch 1		<b>Australian Prudential Regulation Authority</b>	
§ 292-100(1)	315	§ 12(1)	110	– Pt 4-25	21	ARS 750.0	330
§ 292-100(4)(b)(i)	315	§ 12(2)	199	– Div 284	21	SPG 270	138, 141
§ 292-100(4)(c)	315	§ 12(3)	110	– Div 290	23	<b>Australian Securities &amp; Investments Commission</b>	
§ 292-465	139, 141	§ 12(8)	110	– § 12-35	13	RG 277	138
§ 295-490(1)	7	<b>Superannuation Guarantee (Administration) Regulations 2018</b>	202	– § 12-40	13, 199	<b>Australian Taxation Office</b>	
§ 295-545	43, 345	<b>Superannuation Guarantee Charge Amendment Bill 2025</b>	201	– § 280-50	4	GSTD 2004/4	314
§ 295-545(2A)	43	<b>Superannuation Industry (Supervision) Act 1993</b>	7, 36	– § 280-103	21	ID 2002/172	254
§ 295-545(2A)(b)	43	§ 10	136, 340	– § 284-15	22	ID 2003/203	250
§ 295-550	43, 97–99, 344	§ 10(1)	33	– § 284-75(1)	21	ID 2010/104	139
§ 295-550(1)	43–45, 148	§ 10A	33	– § 284-75(2)	21	IT 2340	303
§ 295-550(1)(a)	39	§ 17A	26, 27, 29, 133, 135, 346	– § 284-90(1)	21	LCG 2016/3	242
§ 295-550(1)(b)	39, 344	§ 17A(2)	132	– § 284-225	91	LCR 2016/3	254
§ 295-550(1)(c)	39, 344	§ 17A(3)	33, 130	– § 284-225(5)	91	LCR 2021/2	36, 44, 45, 147
§ 295-550(2)	43, 97–99	§ 17A(4)	33	– § 285-145	21	LCR 2021/2DC	147, 148, 344
§ 295-550(3)	43, 97, 99	§ 17B	26, 346	– § 350-10(1)	276, 277	LI 2025/D22	299, 300
§ 295-550(4)	43, 97–99	§ 17B(2)	27	– § 357-55	88	MT 2006/1	301
§ 295-550(5)	43, 97–99	§ 35C	39	– § 359-5(1)	88	MT 2008/1	21, 233
§ 295-550(8)	39, 43, 44, 146, 147, 344	§ 38A	147	– § 359-45	89	MT 2008/2	22, 23
§ 302-10	340	§ 66	39	– § 359-60	89	MT 2012/3	91
§ 302-60	340, 342	§ 71(1)(g)	39	– § 359-65	90	PBR 1012545708356	138
§ 302-140	342	§ 82	39	– § 359-70	90	PBR 1012557133149	145
§ 302-145	342	§ 82 to 85	39	– § 382-5	62	PBR 1012571177732	145
§ 302-195	33, 340	§ 83	39	– § 390-115	137	PBR 1012648073225	145
§ 302-200	33	§ 109	39	<b>Taxation Administration Act 1996 (NSW)</b>	119	PBR 1012767930109	138
§ 304-10(4)	141	§ 118	136	§ 97	119	PBR 1052090528673	31
§ 307-10(e)	7	§ 160	227	<b>Taxation Laws Amendment (No. 3) 1998</b>	79	PBR 1052097327812	31
§ 328-180	254	<b>Superannuation Industry (Supervision) Regulations 1994</b>	36, 227	<b>Taxation (Multinational – Global and Domestic Minimum Tax) Imposition Act 2024</b>	225	PBR 1052110338557	254, 313, 314
§ 328-180(1)	254	Div 6.3	138	<b>Taxation of Chargeable Gains Act 1992 (UK)</b>	206	PBR 1052216694007	313
§ 328-200	254	reg 1.04AAAA	30	§ 87	206	PBR 1052286890635	94
§ 328-210(2)	254	reg 6.17A	33	<b>Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019</b>	43	PBR 1052294374162	314
§ 328-243	247, 254	reg 6.21	33	<b>Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023</b>	34	PCG 2016/5	43
§ 328-245(2)	254	reg 6.22	33, 340, 342	Div 296	34	PCG 2016/16	99
§ 328-245(3)	254	reg 6.22(2)	340	<b>Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023</b>	278	PCG 2017/13	79
§ 328-250	254	reg 7.04	138	Div 296	207–209	PCG 2018/9	190–192
§ 328-255	254	reg 7.04(4)	138, 139	<b>Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023</b>	278	PCG 2020/5	43, 44
§ 328-440	254	reg 7.04(4)(a)	138, 141	Div 296	207–209	PCG 2021/4	172, 180, 184–186
§ 385-160(2)	254	reg 7.04(4)(b)	138, 141	<b>Treasury Laws Amendment Bill 2025</b>	201	PCG 2021/D2	184
§ 392-25	254	reg 8.02B	39	2025	201	PCG 2022/2	78
§ 393-10(4)	240	reg 13.18AA(7)	39	<b>Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Act 2024</b>	189, 225	PCG 2024/D2	172, 180–182, 184, 186
§ 775-15(2)	127	<b>Tax Agent Services Act 2009</b>	4, 23, 56, 58, 62, 163	<b>Treasury Laws Amendment (More Cost of Living Relief) Act 2025</b>	296	PCG 2025/1	7
§ 995-1	44, 99, 127	Div 30	231	<b>Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024</b>	225	PCG 2025/3	227
§ 995-1(1)	254	§ 20-5(3)(d)(i)	168	<b>Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025</b>	161, 295	PCG 2025/D5	295
<b>Judiciary Act 1903</b>		§ 30-10	231	Sch 7	295	PS LA 2005/24	265
§ 39B	273	§ 30-10(1)	168	<b>Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2023</b>	344	PS LA 2006/8	5
§ 39B(1)	273	§ 30-10(2)	168	<b>Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023</b>	44	PS LA 2008/1	139
§ 39B(1A)	273	§ 30-10(4)	168	<b>Treasury Laws Amendment (Tax Incentives and Integrity) Act 2025</b>	4, 161	PS LA 2008/5	23
<b>Law of Property Act 1936 (SA)</b>		§ 30-10(7)	168	Sch 2	4	PS LA 2010/4	74, 75, 79
§ 61	324	§ 30-10(9)	231	<b>Taxation</b>		PS LA 2011/4	164, 276
§ 62	324	§ 30-10(10)	231	<b>Taxation (Multinational – Global and Domestic Minimum Tax) Imposition Act 2024</b>	225	PS LA 2011/12	5
<b>New Business Tax System (Alienation of Personal Services Income) Bill 2000</b>	187	§ 30-10(14)	168	<b>Taxation of Chargeable Gains Act 1992 (UK)</b>	206	PS LA 2011/27	89
<b>Payroll Tax Act 1971 (NSW)</b>	225	<b>Tax Agent Services Act 2009</b>	4, 23, 56, 58, 62, 163	<b>Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019</b>	43	PS LA 2021/D3	139
<b>Payroll Tax Act 2007 (NSW)</b>	200, 295	Div 30	231	<b>Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023</b>	34	PS LA 2025/D1	59
§ 48(1)(c)	200	§ 20-5(3)(d)(i)	168	Div 296	34	PS LA 2025/D2	227
§ 48(2)	200	§ 30-10	231	<b>Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Act 2024</b>	189, 225	QC 66042	95
<b>Payroll Tax Act 2007 (Vic)</b>		§ 30-10(1)	168	<b>Treasury Laws Amendment (More Cost of Living Relief) Act 2025</b>	296	TA 2013/3	184
§ 32(1)(a)	110	§ 30-10(2)	168	<b>Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024</b>	225	TA 2015/2	227
§ 32(2)(b)(ii)	111	§ 30-10(4)	168	<b>Treasury Laws Amendment (Strengthening Financial Systems and Other Measures) Bill 2025</b>	161, 295	TA 2015/4	254
<b>Powers of Attorney Act 1980 (NT)</b>	48	§ 30-10(7)	168	Sch 7	295	TA 2025/2	113
§ 6A	48	§ 30-10(9)	231	<b>Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2023</b>	344	TD 8	94, 95
<b>Powers of Attorney Act 1998 (Qld)</b>	48	§ 30-10(10)	231	<b>Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023</b>	44	TD 93/187	89
§ 34	48	§ 30-10(14)	168	<b>Treasury Laws Amendment (Tax Incentives and Integrity) Act 2025</b>	4, 161	TD 94/20W	89
Sch 3	48	<b>Tax Agent Services (Code of Professional Conduct) Determination 2024</b>	62	Sch 2	4	TD 95/10	254
<b>Powers of Attorney Act 2000 (Tas)</b>	48	§ 30	62–64	<b>Taxation</b>		TD 96/3	250
§ 42	48	<b>Taxation Administration Act 1953</b>	233	<b>Taxation (Multinational – Global and Domestic Minimum Tax) Imposition Act 2024</b>	225	TD 1999/69	93–95
<b>Powers of Attorney Act 2003 (NSW)</b>	47	Pt IIA	4	<b>Taxation of Chargeable Gains Act 1992 (UK)</b>	206	TD 2002/25	125
§ 8	48	Pt IVC	89, 268–270, 273, 274	§ 87	206	TD 2003/28	145
§ 21(1)	47	§ 3DB(5)	59	<b>Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019</b>	43	TD 2004/63	73, 79
§ 25	48	§ 3DB(6)	59	<b>Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023</b>	34		

TD 2006/77	316	Carter v FCT [2001] FCA 575	277	Evans and FCT [2025] ARTA 824	60	Minister Administering National Parks and Wildlife Act 1974 v Halloran [2004] NSWCA 118	119, 120
TD 2014/25	127	Cherry Tree Investments Ltd v Landmain Ltd [2013] Ch 305	325	Everett; FCT v [1980] HCA 6	185	Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541	274, 277
TD 2021/D6	139	Chevron Australia Holdings Pty Ltd v FCT [2015] FCA 1310; [2017] FCAFC 62	272	F		Mochkin; FCT v [2003] FCAFC 15	181, 183
TD 2022/11	75, 77-79, 239	Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd [2005] HCA 3	266	Fischer v Nemeske Pty Ltd [2016] HCA 11	254	Morton v FCT [2025] FCA 336	301
TD 2025/4	58, 59	Chief Commissioner of State Revenue v Uber Australia Pty Ltd [2025] NSWCA 172	296	Fortunatow; FCT v [2020] FCAFC 139	176	Moss v Hancock [1899] 2 QB 111	127
TD 2025/5	161	Citigroup Pty Ltd v National Australia Bank Ltd [2012] NSWCA 381	140	Futuris Corporation Ltd; FCT v [2008] HCA 32	277	Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37	258, 264
TD 2025/6	228	Clerk v Equity Trustees Executors and Agency Co Ltd (1913) 15 CLR 625	325	G		MS [2025] WASAT 49	45
TD 2025/7	299	Colonial First State Investments Ltd v FCT [2011] FCA 16	99	Gainer Associates Pty Ltd, In the matter of [2024] NSWSC 1138	26	Munro v Munro [2015] QSC 61	30
TR 93/12	264	Commissioner of Inland Revenue v Ward [1970] NZLR 1	254	Galland; FCT v [1986] HCA 83	185		
TR 93/32	254	Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329	325	Gartside v Inland Revenue Commrs [1968] AC 553	145		
TR 94/4	89	Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd [1994] HCA 61	142	GE Capital Finance Australasia Pty Ltd v FCT [2011] FCA 849	325		
TR 95/25	254	Commissioner of State Revenue v Rojoda Pty Ltd [2020] HCA 7	325	Gengoult-Smith Family Trust, Re [2024] VSC 189	319		
TR 95/35	145	Commonwealth Director of Public Prosecutions v William Wheatley (unreported, Victorian County Court, May 2025, No. CR-24-00217)	125, 127	Glencore Investment Pty Ltd v FCT [2019] FCA 1432	272		
TR 97/11	254	Conexa Sydney Holdings Pty Ltd v Chief Commr of State Revenue (NSW) [2025] NSWCA 20	120	Glencore Investment Pty Ltd; FCT v [2020] FCAFC 187	276		
TR 97/17	196	Constantinou, In the Estate of [2012] 2 QSC 332	322	Granby Pty Ltd v FCT [1995] FCA 1217	44		
TR 2001/8	176	Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1	110, 111, 174, 175, 199	Grofam Pty Ltd v FCT [1997] FCA 660	91		
TR 2004/15	189, 190	Corporate Initiatives Pty Ltd v FCT [2005] FCAFC 62	75	Guardian AIT Pty Ltd; FCT v [2023] FCAFC 3	265		
TR 2004/18	107	CPT Custodian Pty Ltd v Commr of State Revenue [2005] HCA 53	99, 324	GYBW and FCT [2019] AATA 4262	98		
TR 2005/12	252-254	Craddock Brothers v Hunt [1923] 2 Ch 136	325	H			
TR 2006/7	97-99	Creaton Pty Ltd and FCT [2002] AATA 1121	179	Harding v FCT [2018] FCA 837	61		
TR 2010/1	139	CT v Steeves Agnew & Co (Vic) Pty Ltd [1951] HCA 26	314	Hart; FCT v [2004] HCA 26	187		
TR 2010/3	74, 75, 79	D		Hart v Zuda Pty Ltd [2021] WASC 59	30		
TR 2010/4	266	Dalby and FCT [2025] ARTA 1060	114	Hill v Zuda Pty Ltd [2022] HCA 21	30		
TR 2018/5	190, 191	Darrelen Pty Ltd v FCT [2010] FCAFC 35	98	Hollis v Vabu Pty Ltd [2001] HCA 44	110, 174		
TR 2021/D4	264	David Securities Pty Ltd v Commonwealth Bank of Australia [1992] HCA 48	139	Holmden's Settlement Trusts, Re [1968] AC 685	41		
TR 2022/3	173, 174, 176-178, 180, 187	De Lorenzo v De Lorenzo [2020] NSWCA 351	323	Howard v Duke of Norfolk (1682) 3 Ch Cas 1	318		
TR 2023/1	67, 68	Denton v Donner (1856) 23 Beav 285	121	HWFX and FCT [2025] ARTA 680	9		
TR 2023/4	187	Denver Chemical Manufacturing Co v FCT (NSW) [1949] HCA 25	9	I			
TR 2024/D1	264	Dion Investments Pty Ltd, Re (2014) 87 NSWLR 753	324	Idenix Pharmaceuticals LLC v Gilead Sciences Pty Ltd (No. 2) [2018] FCAFC 7	277		
<b>Superannuation Complaints Tribunal</b>		Dixon and Consulting Pty Ltd and FCT [2007] AATA 1786	177	Illopolo & Hesford v Conti [2013] WASC 389	30		
Determination D06-07129	138	Doma ACT Pty Ltd v LN Sydney Pty Ltd [2024] ACTSC 270	321	IRG Technical Services Pty Ltd v DCT [2007] FCA 1867	175		
<b>Tax Practitioners Board</b>		Domazet v Jure Investments Pty Ltd [2016] ACTSC 33	318, 325	J			
TPB(I) 17/2013	231, 232	Donovan v Donovan [2009] QSC 26	30	J & G Knowles and Associates v FCT [2000] FCA 196	13, 14, 203		
TPB(I) 18/2013	231, 232	Douglass v FCT [2019] FCA 1246	175	K			
TPB(I) 47/2024	63	Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409	277	Katz v Grossman [2005] NSWSC 934	30		
TPB(PN) 3/2019	233	Dryandra Investments Pty Ltd v Hardie [2024] WASC 248	41	Kenyon v Spry [2008] HCA 56	210		
<b>Cases</b>		Duke of Norfolk's case: Howard v Duke of Norfolk (1682) 3 Ch Cas 1	318	Kilgour v FCT [2024] FCA 687	45		
<b>A</b>		Dulux Holdings Pty Ltd & Orca Ltd; FCT v [2001] FCA 1344	143, 145	Kirtlan and FCT [2025] ARTA 539	8, 67, 69		
Abotomey and FCT [2025] ARTA 719	61	E		L			
Ahmad and FCT [2025] ARTA 1907	228	Eichmann v FCT [2020] FCAFC 155	306	Lee v Lee [2019] HCA 28	277		
Air Jamaica Ltd v Charlton [1999] 1 WLR 1399	318	Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7	258, 264	Les Laboratoires Servier v Apotex Pty Ltd [2016] FCAFC 27	277		
Alan Synman Family Trust, In the matter of [2013] VSC 264	324	EM McPherson Settlement, Re [2024] VSC 744	320	Liang; FCT v [2025] FCAFC 4	66		
Alcoa of Australia Ltd and FCT [2025] ARTA 482	271, 275	Estate of Stagliano, Re [2025] VSC 39	322	Lowther Park Pty Ltd as trustee for the Lowther Park Family Trust v Simon Della Marta [2023] NSWSC 1555	324		
Allnutt v Wilding [2007] EWCA Civ 412	325	Evangelista Family Trust, Re [2025] QSC 83	319	LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12	275		
AMP Ltd v Chubb Insurance Australia Ltd (No. 2) (evidence by AVL) [2025] NSWSC 789	275			Lunn and Tax Practitioners Board [2025] ARTA 697	7		
APRA v Derstepanian [2005] FCA 1121	44			Lygon Nominees Pty Ltd v Commr of State Revenue [2005] VSC 247	212		
Arthur Brady Family Trust, Re [2015] 2 Qd R 172	324			M			
Ashton, TM and Ashton, PLA [1986] FamCA 20	212			Macquarie Bank Ltd v FCT [2013] FCAFC 119	24, 89		
Australia Investment Holding Group Pty Ltd and FCT [2025] ARTA 1185	115			MacRobertson Miller Airline Services v Commr of State Taxation (WA) (1975) 133 CLR 125	121		
Auz Taxation Pty Ltd and Tax Practitioners Board [2025] ARTA 1711	166, 229, 233			McGowan & Valentini Trust, Re (2021) 63 VR 449	324		
<b>B</b>				McIntosh v McIntosh [2014] QSC 99	30		
Baba v Sheehan [2021] NSWCA 58	136			McMahon; FCT v [1997] FCA 1087	90		
Baird v BCE Holdings Pty Ltd [1996] NSWSC 376	138			McNee v Lachlan McNee Family Maintenance Pty Ltd [2020] VSC 273	40, 41		
Bamford; FCT v (2010) 240 CLR 481	320			Merchant v FCT [2024] FCA 498; [2025] FCAFC 56	272		
Bayeh v DCT [1999] FCA 1194	276, 277			Miller v Race (1758) 1 Burrow 452	126		
Beck v Henley [2014] NSWCA 201	325			Minerva Financial Group Pty Ltd v FCT [2022] FCA 1092; [2024] FCAFC 28	272		
Bellinz Pty Ltd v FCT [1998] FCA 284	89						
Bellinz Pty Ltd v FCT [1998] FCA 615	89						
Benaroon Pty Ltd v Larmar [2020] QCA 62	321						
Bendel and FCT [2023] AATA 3074	143						
Bendel; FCT v [2025] FCAFC 15	53, 57, 73, 75-79, 143, 186, 225, 239, 295						
Bennetts and FCT [2025] ARTA 1092	115						
Benz v Armstrong [2022] NSWSC 534	28						
BQKD and FCT [2024] AATA 1796	14, 203						
Bywater Investments Ltd v FCT; Hua Wang Bank Berhad v FCT [2016] HCA 45	190-193						
<b>C</b>							
Caldwell & Caldwell [2025] FedCFamCif 506	210, 212						
Cameron Brae Pty Ltd v FCT [2007] FCAFC 135	22						
Cameron v FCT [2012] FCAFC 76	176						
Carter and Tax Practitioners Board [2025] ARTA 632	1						
<b>Official Receiver in Bankruptcy v Schultz [1990] HCA 45</b>	325						
<b>Oil Basins Ltd v Commonwealth (1993) 178 CLR 643</b>	277						
<b>Olow and FCT [2025] ARTA 1924</b>	301						
<b>Oracle Corporation Australia Pty Ltd v FCT [2024] FCA 1262</b>	277						
<b>Oracle Corporation Australia Pty Ltd v FCT [2025] FCAFC 145</b>	264, 296						
<b>Oshlack v Richmond River Council [1998] HCA 11</b>	277						
<b>Owies v JJ Nominees Pty Ltd [2022] VSCA 142</b>	325						
<b>P</b>							
<b>Peabody; FCT v [1994] HCA 43</b>	187						
<b>PepsiCo, Inc v FCT [2023] FCA 1490</b>	164, 258, 264, 272						
<b>PepsiCo, Inc v FCT [2024] FCAFC 86</b>	164, 256, 272						
<b>PepsiCo, Inc; FCT v [2025] HCA 30</b>	163, 256, 261, 264-266, 276, 296						
<b>Personalised Transport Services Pty Ltd v AMP Superannuation Ltd [2006] NSWSC 5</b>	137						
<b>Pickering Family Trusts, Re the [2024] VSC 5</b>	324						
<b>Pitt v Holt [2013] UKSC 26</b>	325						
<b>Plator Nominees Pty Ltd, Re [2012] VSC 284</b>	324						
<b>Prygodiczv Commonwealth (No. 2) [2021] FCA 634</b>	140						
<b>PTBS and FCT [2025] ARTA 1262</b>	164						
<b>Public Servant and FCT [2014] AATA 247</b>	90						
<b>Public Trustee v Smith [2008] NSWSC 397</b>	321						
<b>Pulbrook, Re; Pulbrook v Pulbrook (1937) 37 SR (NSW) 345</b>	325						
<b>Q</b>							
<b>Queensland Trustees Ltd v Commr of Stamp Duties [1952] HCA 52</b>	145						
<b>R</b>							
<b>R &amp; D Holdings Pty Ltd v DCT [2006] FCA 981</b>	233						
<b>R &amp; D Holdings Pty Ltd; FCT v [2007] FCAFC 107</b>	233						
<b>RCI Pty Ltd; FCT v [2011] FCAFC 104</b>	261, 262, 265						
<b>Rentis Pty Ltd, Re [2023] QSC 252</b>	26						
<b>Ridgewell v Ridgewell [2007] EWHC 2666</b>	324						
<b>Roberts; FCT v; FCT v Smith (1992) 23 ATR 494</b>	254						
<b>Robodebt case: Prygodiczv Commonwealth (No. 2) [2021] FCA 634</b>	140						
<b>Rosgoe Pty Ltd v FCT [2015] FCA 1231</b>	90						
<b>Roth, Re [2022] VSC 511</b>	325						
<b>Roxborough v Rothmans of Pall Mall Australia Ltd [2001] HCA 68</b>	142						
<b>Ruhamah Property Co Ltd v FCT [1928] HCA 22</b>	20						
<b>Rule v Mallon [2000] NSWSC 346</b>	325						
<b>S</b>							
<b>Sandini Pty Ltd v FCT [2017] FCA 287</b>	277						
<b>Saunders v Vautier [1841] EWHC J82</b>	341						

Scimitar Systems Pty Ltd and DCT [2004] AATA 720.....175, 178	<b>Burgess, M</b> Holistic tax and estate planning: a guide for 2026..... 318	– Tax certainty: a fundamental principle..... 224	<b>Tranzillo, J</b> Litigating tax disputes: key issues..... 268
Scott and Australian Securities and Investments Commission [2009] AATA 798.....8	<b>Butler, D</b> Superannuation – Is the Div 296 tax another ABUM?.....207	<b>L</b> <b>Lagana, A</b> PepsiCo: a guide to the ongoing implications..... 256	<b>Treatt, S</b> CEO's Report – Changes for a sustainable future.....3
SEPL Pty Ltd as trustee of the SFT Trust: FCT v [2025] FCA 581.....11, 53	– NALI and NALE – ATO finalises NALI ruling: part 4..... 344	<b>Lay, E</b> Member Spotlight..... 72	– Great leaders invest in knowledge.....157
Shand v Chief Commr of State Revenue [2025] NSWSC 818.....118, 121	– NALI and NALE – dividend, fixed and non-fixed NALI: part 2..... 97	<b>M</b> <b>Macpherson, B</b> Personal services income: the current landscape.....172	– Our growth in the last financial year..... 223
Singapore Telecom Australia Investments Pty Ltd v FCT [2021] FCA 1597; [2022] FCA 260; [2024] FCAFC 29.....272	– NALI and NALE – NALI still needs fixing: part 1.....43	<b>Mahar, F</b> Corporatising the family farm..... 238	– Shaping the moment at The Tax Summit 2025.....109
Skiba and FCT [2007] AATA 1705.....175	– NALI and NALE – the new general NALE provisions: part 3.....146	<b>Martin, F</b> How the Higher Education Loan Program works.....81	– The Tax Summit: shape your moment.....55
Suncorp Insurance and Finance v Commr of Stamp Duties [1998] 2 Qd R 285.....120	– Revised Div 296 super tax from 1 July 2026.....278	<b>Mascolo, S</b> An old chestnut revisited: is Bitcoin money?..... 125	– Wrapping up a year of sharing knowledge..... 293
<b>T</b> Taneja and FCT [2009] AATA 87.....175	<b>C</b> <b>Chamberlain, M</b> Corporate tax residency: should we care?..... 189	<b>Monotti, W</b> A Matter of Trusts – The powers of the court in varying trusts.....40	<b>Tucker, J</b> Employment benefit myths and misconceptions.....194
Tito v Waddell (No. 2) [1977] Ch 106.....119	<b>Collins, B</b> Understanding and managing tax uncertainty: part 1.....19	<b>P</b> <b>Pascale, J</b> Bendel goes to the High Court: critical issues for private groups.....73	<b>W</b> <b>Wedd-Elliott, S</b> A Matter of Trusts – Cross-border considerations for TDTs and the estate plan.... 204
Trail Bros Steel & Plastics Pty Ltd; FCT v [2010] FCAFC 94..... 261	Understanding and managing tax uncertainty: part 2..... 87	<b>Reynolds, K</b> Member Spotlight.....124	<b>Wilmore, A</b> Member Spotlight..... 17
Traveler Ltd v FCT [2008] FCA 1961.....126	<b>D</b> <b>Dallas, N</b> Loss of trustee capacity in SMSFs... 129	<b>R</b> <b>Sandow, T</b> President's Report – Challenges in trusts.....2	
Trustee for Goldenville Family Trust A/C Xiangming Huang and FCT [2025] ARTA 1355.....325	<b>Donlan, T</b> Successful Succession – Don't forget the trust's purpose.....210	– Creating the Institute we want to see..... 222	
Trustee for MH Ghali Superannuation Fund and FCT [2012] AATA 527.....45, 99	– Powers of attorney and foreign jurisdictions..... 46	– The pursuit of perfection..... 156	
<b>U</b> Uber Australia Pty Ltd v Chief Commr of State Revenue [2024] NSWSC 1124.... 296	<b>E</b> <b>Eyres, T</b> Farm equity partnerships..... 326	– Reflecting on 2025 and what it meant to the industry..... 292	
<b>V</b> van Camp v Bellahealth Pty Ltd [2024] NSWSC 7.....27	<b>F</b> <b>Figot, B</b> Superannuation – Is the Div 296 tax another ABUM?.....207	– The Tax Summit: shaping our moment together.....108	
VGM Holdings Ltd, Re [1942] Ch 235.... 325	<b>G</b> <b>Gandhi, N</b> Mid Market Focus – Tax residency issues.....67	– The Tax Summit: shaping the industry together.....54	
VZFS and FCT [2025] ARTA 2013.....300	<b>Gao, J</b> A Matter of Trusts – MRE: multiple units and land consolidation..... 93	<b>Schaefer, S</b> Estate planning.....26	
<b>W</b> Walstern v FCT [2003] FCA 1428.....22	<b>Goodfellow, K</b> Business restructures using the small business CGT concessions.....309	Super and SMSFs: where are the goal posts?.....34	
Weston's Settlement, Re [1969] 1 Ch 223.....324	Corporatising the family farm..... 238	<b>Slegers, P</b> Bendel goes to the High Court: critical issues for private groups..... 73	
Williams v Scott [1900] AC 499.....121	<b>Guruge, A</b> Understanding and managing tax uncertainty: part 1.....19	<b>Stead, F</b> Superannuation – NALI and NALE – dividend, fixed and non-fixed NALI: part 2..... 97	
Williams v Williams [2023] QSC 90.....28	Understanding and managing tax uncertainty: part 2..... 87	– NALI and NALE – NALI still needs fixing: part 1.....43	
Wood Trading Co Ltd, Re (1927) 28 SR (NSW) 106.....325	<b>H</b> <b>Hall, J</b> Restitution in the Australian tax and superannuation systems.....137	– NALI and NALE – ATO finalises NALI ruling: part 4..... 344	
Woodcock & Woodcock (No. 2) [2022] FedCFamC1F 173.....212	<b>Hodson, G</b> Member Spotlight..... 236	– NALI and NALE – the new general NALE provisions: part 3..... 146	
Woolwich Equitable Building Society v Inland Revenue Commrs [1993] AC 70.....142	<b>I</b> <b>Imbriano, L</b> Litigating tax disputes: key issues..... 268	<b>Storey, J</b> Tax Counsel's Report – Harmonising the definition of "employee"..... 110	
Wooster v Morris [2013] VSC 594.....30	<b>J</b> <b>Jackson, C</b> Estate planning..... 26	<b>Swadling, C</b> Litigating tax disputes: key issues..... 268	
WorkPac Pty Ltd v Rossato [2021] HCA 23.....174	<b>James, A</b> Corporate tax residency: should we care?.....189	<b>T</b> <b>TaxCounsel Pty Ltd</b> Tax News – what happened in tax? – June 2025.....6	
<b>X</b> XLZH and FCT [2025] ARTA 2154.....303, 306	<b>Jury, J</b> Bendel goes to the High Court: critical issues for private groups..... 73	– July 2025..... 58	
<b>Y</b> Yalos Engineering Pty Ltd; FCT v [2009] FCA 1569.....176	<b>K</b> <b>Krishnan, S</b> Associate's Report – Changes to GIC/SIC from 1 July 2025.....4	– August 2025..... 113	
<b>Z</b> ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.....110, 111, 174, 175, 199		– September 2025.....161	
		– October 2025.....227	
		– November 2025.....298	
		<b>Tax Tips</b> – "Agreement" issues..... 118	
		– FBT issues.....11	
		– Investigation: caution not termination.....166	
		– Pre- or post-CGT asset?..... 303	
		– Reasonable care: TPB code of conduct..... 231	
		– Taxation records: tax agent issues..... 62	
<b>Authors</b>			
<b>A</b> <b>Abdalla, J</b> Head of Tax & Legal's Report – 2025: the year in review..... 294			
– The imminent need for holistic tax reform.....56			
– Tax Reform Roundtables: the future of tax policy..... 158			
<b>B</b> <b>Backhaus, S</b> Superannuation – Revised Div 296 super tax from 1 July 2026.....278			
<b>Blackwood, C</b> PepsiCo: a guide to the ongoing implications..... 256			
<b>Boyle, C</b> PepsiCo: a guide to the ongoing implications..... 256			
<b>Briglia, P</b> A Matter of Trusts – Superannuation proceeds trusts..... 340			
<b>Brydges, N</b> A Matter of Trusts – UPEs and CGT: it's not all about Bendel..... 143			

# Giving back to the profession

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